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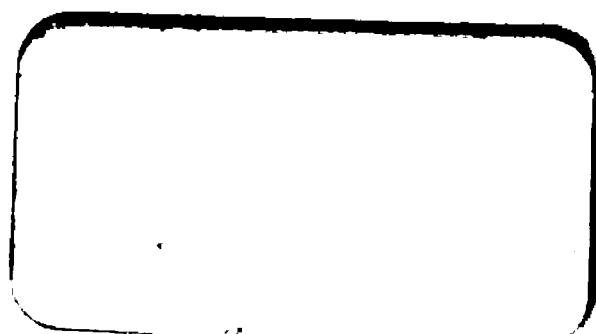
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VOL. 60—IOWA REPORTS.

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July 7

REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF IOWA.

By JOHN S. RUNNELLS,

REPORTER.

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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA:

DES MOINES, DECEMBER TERM, A. D. 1878.

IN THE THIRTY-SECOND YEAR OF THE STATE.

PRESENT:

HON. JAMES H. ROTHROCK,	CHIEF JUSTICE.
" JOSEPH M. BECK,	} JUDGES.
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	
" JAMES G. DAY.	

DAVIS V. BOGET ET AL.

1. **School District:** USE OF SCHOOL-HOUSE. The electors of a district township, when legally assembled, may authorize the use of the school-houses of the district for religious purposes, and under the authority thus conferred a sub-director is empowered to permit the school-house of his sub-district to be so used.
2. ———: ———: CONSTITUTIONAL LAW. The use of a school-house for such purpose, when so authorized, is not prohibited by section 3, article 1 of the Constitution.

Davis v. Boget.

Appeal from Iowa Circuit Court.

FRIDAY, DECEMBER 6.

It is alleged in the petition that the district township of Lenox, in Iowa county, is composed of four sub-districts; that the plaintiff is a resident of sub-district No. 1, and that defendants are members of, and comprise, the board of directors of said district township; that at the annual meeting of said board, and the electors of said district township, held on the 12th day of March, 1877, the said electors voted upon and passed a resolution taking the charge and control of the school house in said sub-district No. 1 away from the said sub-director of said sub-district, and placing the charge and control of the same in the said board of directors, and directing that the key of the door of the school-house in said sub-district No. 1 should be placed in the hands of the president of the said district township board; and that all the school-houses in said township should be opened for Sabbath school and religious worship, and lectures on moral and scientific subjects, at any time when it will not interfere with the regular progress of the schools; and that any person asking for the use of any school-house should be held strictly responsible for all damages done to the same by such use, and if the persons desiring the use of said school-houses for such purposes should be financially irresponsible, then the board should require security for any damages that might be done to said houses; that the defendant E. J. Boget is director of said sub-district No. 1, and is president of the said township board, and the key to said school-house is in his possession and under his control; that the other school-houses in said township are opened for the purposes aforesaid, and their use for the same is permitted; that on the 26th day of April, 1877, the plaintiff requested the said Boget to deliver to him the key to said school-house, that he and others might occupy the house for Sabbath school and religious worship on the

Davis v. Boget.

Sabbath, and offered security for the proper care of the same, but said Boget refused and neglected, and still refuses, to allow the key to be taken for the purpose of opening the house for such use, and refuses to open said house himself; that afterward, at a meeting of the said board of district township directors, plaintiff requested of said board the use of said school-house for said purposes, and offered security for the proper care thereof, but said board refused and neglected to take any action in the matter; that by the wrongful action of the said board and its president, in refusing to allow said house to be so used, the plaintiff and other residents of said district No. 1 are injured, there being no church building in said district No. 1, nor at a convenient distance from said district, which can be used for the purposes aforesaid.

It is prayed that a writ of *mandamus* may issue commanding the said Boget and said board to permit the use of said school-house for said purposes.

There was a demurrer to the petition, which was overruled, and judgment was rendered for the plaintiff. Defendants appeal.

Rumple & Lake, for appellants.

Hedges & Alverson, for appellee.

ROTHROCK, CH. J.—I. In addition to the foregoing statement it may be proper to say that it was stipulated by the parties in the court below that the school-house in sub-district No. 1 cost that district about two hundred dollars, in addition to its proportionate share of the cost of the house, and that a small majority of the electors of the sub-district are opposed to the use of the house for religious worship.

In our opinion these facts cannot control the legal rights of the parties, and they must be regarded merely as accounting for what would otherwise seem as an unreasonable refusal of the defendant Boget to carry out the wishes of a majority of the electors of the district township.

Davis v. Boget.

It is insisted by counsel for appellant that the action of *mandamus* will not lie because the act required to be performed is not one which the law enjoins, as a duty resulting from an office, trust or station, as provided in section 3373 of the Code. This would no doubt be correct if the electors of the township had not the power to determine that the school-house might at proper times be used for religious meetings and Sabbath schools. If the electors have such power, then the duty of the directors to open the houses for these purposes is as clearly enjoined by law as though expressly provided by statute, and the action of *mandamus* will lie.

II. It appears from the record before us that the electors of the district township, by a resolution duly adopted at a regular meeting, placed the control of the school-house in question in the board of district township directors, and ordered that it should be opened for Sabbath school, religious worship, and lectures on moral and scientific subjects, at such times as would not interfere with the regular progress of the public schools. It also appears that this action was taken because the sub-director of the sub-district in question had refused to allow the house to be used for the purposes named.

The main question in the case, then, is, did the district township electors have the legal power to direct the house to be used for the purposes aforesaid?

We cannot regard this as an open question in this State. In *Townsend v. Hagan et al.*, 35 Iowa, 194, it was held that the statute confers authority on the electors of the district, when legally assembled, "to direct the sale or other disposition to be made of any school-house," and that the sub-director shall have the control and management of the school-house in his sub-district, unless otherwise ordered by a vote of the district township meeting; and that when the electors of the township, by a direct vote, determined that the school-houses should be opened for religious worship and Sabbath schools, such order was valid, and was such a disposition of

1. SCHOOL dis-
trict: use of
school-house.

Davis v. Boget. .

the house as might lawfully be made. This decision was made in the year 1872. It is founded upon a construction of chapter 172 of the Laws of 1862. The same provisions are contained in sections 1717 and 1753 of the Code. In view of the fact that the statute construed in the case cited has been re-enacted by the General Assembly since that decision was made, and presumably with a knowledge of the construction put upon it by this court, we are not disposed to disturb the ruling in that case.

III. It is next insisted that, notwithstanding such use of the house in question may be authorized under the construction of the statute in *Townsend v. Hagan, supra*,
^{2. —: —: constitutional law.} yet that such use is in conflict with section 3, article 1 of the Constitution of this State, which provides that "the General Assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

It is argued that the permanent use of a public school-house for religious worship is indirectly compelling the taxpayer to pay taxes for the building or repairing of places of worship.

Aside from the consideration that in *Townsend v. Hagan, supra*, it was determined that the district electors did have such power as is here complained of, and that such use was not unreasonable, we incline to think that the use of a public school building for Sabbath schools, religious meetings, debating clubs, temperance meetings and the like, and which, of necessity, must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so where, as in the case at bar, abundant provision is made for securing any damages which the tax-payer may suffer by reason of the use of the house for the purposes named. With such precaution the

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amount of taxes any one would be compelled to pay by reason of such use would never amount to any appreciable sum.

We may further say that the use for the purposes named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the school-house into a building for worship, within the meaning of the constitution. The same reasoning would make our halls of legislation places of worship, because in them, each morning, prayers are offered by chaplains.

Counsel for appellant have cited some cases which seem to hold a different rule from that here announced. We need not refer to them, in view of the construction placed upon our statute in *Townsend v. Hagan, supra*, and with which we are content.

AFFIRMED.

THE DES MOINES GAS COMPANY V. WEST ET AL.

1. **Corporation: NEGLIGENCE OF STOCKHOLDER: TRUSTEE: FRAUD.** The capital stock of a corporation consisted of one hundred thousand dollars, evidenced by one thousand shares of stock, of which A., the president of the company, held seven hundred and sixty-nine shares. The articles limited the indebtedness of the company to twenty-five thousand dollars. In 1871 he borrowed a certain sum of the Newark Savings Bank, pledging seven hundred shares of the stock as collateral, at the same time surrendering his certificates of stock, and receiving in place thereof new certificates, seven hundred being issued to him as trustee, without specifying the *cestui que trust* or character of the trust, and the remainder to him in his own right. In 1872 bonds of the company to the amount of one hundred thousand dollars were issued, and afterward sold. Afterward the articles of incorporation were amended at a pretended meeting, of which no notice was given, permitting the issuance of bonds to retire the stock of the company, and bonds were issued, secured by deed of trust, which were purchased by the defendant the Charter Oak Life Insurance Company for value, and without notice of the fraudulent acts of A.: *Held*, that the Newark Savings Bank, having the power to control the corporation and failing to do it, and negligently permitting A. to exercise such control, would stand in the same relation to the bondholders as A. himself, and that the bonds issued under the amended articles were entitled to protection.

50	16
96	481
<hr/>	
50	16
115	472
115	478

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2. ———: BONDS: NEGOTIABILITY OF. The bonds issued and purchased by the insurance company are entitled to protection in its hands, whether they are negotiable or not.
3. ———: STOCKHOLDERS. It was unnecessary that the stockholders should be made parties in this action, to subject them to the superior equities of the bondholders.
4. ———: LIEN OF ATTORNEY: PRIORITY OF LIENS. The attorney for the company would not have a lien upon the funds in the hands of the company at the time of the appointment of a receiver, which would be superior to the lien of the trust-deed executed to secure the bonds.

Appeal from Polk Circuit Court.

FRIDAY, DECEMBER 6.

THE petition in this case was filed August 31, 1875, and alleges that plaintiff was duly incorporated in 1864, with a capital stock of one hundred thousand dollars, represented by one thousand shares. The articles of incorporation limited the indebtedness of the company to twenty-five thousand dollars. The affairs of the company were managed by five directors, elected yearly. The petition charges that on the 25th of April, 1873, B. F. Allen was a director and president of plaintiff, and held eighty-five shares of stock in the company. Harry West was secretary, and F. R. West was an officer of the corporation. These persons, it is charged, conspired to cheat and defraud the stockholders of plaintiff by issuing bonds secured by mortgage upon the property of the corporation, and did carry out their fraudulent scheme by issuing one hundred bonds of one thousand dollars each, secured by deed of trust, all dated May 5, 1873.

It is alleged that the charter of the corporation conferred no authority upon its officers to execute the bonds and mortgage, but that Allen, in order to carry out his fraudulent scheme, caused to be recorded upon the company's books the proceedings of a pretended meeting of stockholders, at which the articles of incorporation were so amended as to authorize the issuing of the bonds and the execution of the

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mortgage; or new articles of incorporation, conferring such power, were adopted, and the old articles were abrogated.

It is charged that no such meeting of stockholders was, in fact, held.

The pretended record purports to show that Allen and the two Wests, and no others, took part in the proceedings; Allen holding eight hundred and forty-eight shares of stock, and each of the Wests one share.

It is alleged that no notice of the pretended meeting was ever given, and the proceeds of the sale of the bonds were not appropriated to the purpose set out in the mortgage, and no part thereof came into the possession of the company or was devoted to its benefit, but the whole was appropriated by Allen to his own use.

It is charged that the holder of the bonds had full notice of the frauds of Allen and his co-conspirators.

The value of the property of plaintiff covered by the mortgage is averred to be fifty thousand dollars.

The trustee named in the bonds, F. R. West, above named, and all the bondholders known to plaintiff, are made defendants. The cancellation of the bonds and deed of trust, and general relief, are prayed for in the petition.

By an amended petition it is shown that the bonds upon their face purport to be issued by the "Des Moines City Gas Company," which is not the true designation of plaintiff, its corporate name being, "The Des Moines Gas Company."

F. R. West, the trustee, filed a cross-petition setting up the issuing of the bonds and deed of trust of date May 5, 1873, and that the corporation failed to pay the interest due thereon May 1, 1875. The trustee further shows that on the 1st of November, 1872, the gas company issued one hundred bonds, each for the sum of one thousand dollars, which were sold and are now held by purchasers for value. To secure the bonds last named another deed of trust was executed to F. R. West, April 1, 1875, upon all the property of the com-

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pany. Default has been also made in the payment of the interest upon these bonds.

The cross-bill prays for an account of the amount due upon the several bonds, and for the sale of the property upon the deeds of trust. The bonds of the oldest series purport to be "first mortgage bonds." The deed of trust securing them was not executed until after the other series were executed.

The Charter Oak Life Insurance Company, and other holders of the bonds secured by the deed of trust first executed, filed a cross-petition showing that the value of all the property of the gas company does not exceed seventy thousand dollars, and that the corporation is now under the exclusive management of the Newark Savings Institution, which holds, as collateral security upon a debt due it from B. F. Allen, now a bankrupt, seventy thousand dollars of the stock of the gas company, which is of no value.

These parties answer the petition of plaintiff, averring the adoption of the amended articles of incorporation under which the gas company had the right to issue the bonds and execute the deed of trust which defendants hold, and that when the bonds were issued Allen owned all the stock of the corporation except five shares. It is also averred that the bonds were put upon the market and sold for cash, and the deed of trust was executed with the knowledge and consent of all the stockholders; and the Newark Savings Institution had knowledge of the sale of the bonds, and its interest, if any, in the stock is equitable, the title thereof being in Allen.

The answer of the trustee and the Charter Oak Life Insurance Company to the cross-petition of the Newark Savings Institution denies the frauds charged pertaining to the adoption of the amended or new articles of incorporation of the gas company. The plaintiff and the savings institution deny the allegations of the pleadings of the adverse parties inconsistent with their pleadings.

Upon the application of the Charter Oak Insurance Company a receiver was appointed in February, 1876, and at the

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January Term the cause was tried, and a decree entered holding the bonds secured by the first deed of trust, and held by the Charter Oak Life Insurance Company and other defendants, to be valid, and granting relief accordingly.

The plaintiff appeals.

J. B. Bissell and C. C. Cole, for appellant.

Nourse, Kauffman & Co., for appellees.

J. R. Barcroft and C. H. Gatch, for the trustee.

BECK, J.—I. The plaintiff, the Des Moines Gas Company, was organized as a corporation in 1864. Its capital stock was fixed by the articles of incorporation at one hundred thousand dollars, represented by one thousand shares, and the limit of its indebtedness at twenty-five thousand dollars. It assumed authority, under Code, § 1059, "to make contracts, acquire and transfer property, and to possess the same power in such respects as private individuals." The object of the incorporation was the construction of works and laying of pipes to supply the city of Des Moines with gas.

1. CORPORA-
TION: neglect
of stockhold-
er: trustee:
fraud.

B. F. Allen, one of the original incorporators, and president of the company, owned seven hundred and sixty-nine shares of its stock. In 1871 he borrowed of the Newark Savings Institution two hundred thousand dollars, and pledged seven hundred shares of the stock, with other collaterals, as security upon the loan. After this transaction, which was in July, 1871, Allen surrendered all his certificates of stock, including those so pledged, and new certificates were issued; those representing seven hundred shares were issued to him, as trustee, without specifying for whom or for what fund he held the stock, or in any manner specifying the character of the trust. Eighty-five shares were issued to him in his own right. This number was made up of the sixty-nine shares he had before held and sixteen other shares acquired from some other per-

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son. This transaction was in August, 1871. Allen thus held seven hundred shares as trustee, and eighty-five in his own right.

When the certificates of stock to Allen, as trustee, were delivered to the Newark Savings Institution does not appear, further than such transfer was made in 1873, before this amendment of the articles of incorporation of the company was attempted, to which we shall hereafter have occasion to refer. There was nothing on the books of the incorporation showing that the Newark Savings Institution had any interest in the stock or held it.

Notwithstanding the indebtedness of the company was restricted by its articles of incorporation to twenty-five thousand dollars, bonds to the amount of one hundred thousand dollars were issued, bearing date November, 1872. It is highly probable that they were actually issued in 1873, and antedated for some reason demanded by the peculiar practices of Allen in his financial operations. No deed of trust was executed, or at least recorded, to accord with the recitals on the face of the bonds. It was probably discovered that the restrictions in the articles of incorporation would stand in the way of negotiating the bonds. They were deposited in the safe of Allen's bank, until his necessities overcame his caution, when, though as worthless as blank paper, they were every one used to secure large sums borrowed by Allen. Long after the mortgage foreclosed in this case was executed, a deed of trust was given to F. R. West, trustee, to secure these worthless bonds. They cut no figure in this case further than to show the recklessness with which Allen trifled with the rights of others in carrying out his dishonest schemes. It is presumed that the holders of these bonds have no hopes of enforcing them, as they do not appear in this case. But West, the trustee, who appears to have been always the ready instrument of Allen in his schemes of fraud disclosed by the record, insists in his cross-bill upon the validity of these bonds.

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Allen, having discovered that, under its articles of incorporation, the gas company could not be made liable for indebtedness in excess of twenty-five thousand dollars, procured the services of an attorney to devise a way of creating a valid debt against it. He was, at this time, its president, and it will be remembered all his stock was pledged to the Newark Savings Institution. It was found necessary, in order to accomplish Allen's purpose, to amend the articles of incorporation of the company, which was done in this manner: The attorney prepared new articles of incorporation, which his clerk copied into the book of the company, together with minutes of a meeting of stockholders, purporting to record the action whereby the new articles were adopted. No notice of this meeting was given, and, in fact, none was held, but the minutes disclosed regular proceedings, and they were duly signed by Allen and his confederates. Thereupon the bonds and deed of trust were executed. As we have shown, seven hundred shares of Allen's stock were transferred to him as trustee. He continued to be the president of the corporation.

The bonds were sent to his banking house in New York city for sale. Accompanying them was what purported to be a copy of the deed of trust securing their payment. The deed of trust recites that the bonds were issued "to retire" the old stock of the company. The copy on which the bonds were sold recites that the bonds were issued for the purpose of completing the gas works and making extensions thereof. The bonds were sold, and the Charter Oak Life Insurance Company and its co-defendants became purchasers for value, and without notice of the fraudulent acts and intentions of Allen and his confederates. The proceeds of the bonds were appropriated to Allen's use, and not one cent thereof ever went into the hands of the gas company.

The main contest in the case is between the owners of the bonds, the Charter Oak Insurance Company and others, and the stockholders of the gas company, the Newark Savings Institution and others. There is no contest as to who are

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the holders of the bonds and stock. The ownership of fifteen bonds is not known, and the decree of the Circuit Court provides for the protection of the unknown owners. This provision of the decree will be hereafter referred to. We will proceed to consider the conflicting claims of the holders of the bonds and stock.

It must be admitted that the parties holding the bonds acquired them in good faith and for value, and were not informed of the fraudulent designs and practices of Allen and his associates. On the other hand the Newark Savings Institution acquired the stock without actual notice of Allen's operations, and in no manner participated in his frauds. They are all equally innocent, and equally the victims of the bold and unscrupulous financial adventurer, who, the record shows, had the address to gain credit in three separate schemes upon his interest in the gas company, to an amount in each exceeding its value. His stock he had pledged at its face; the second series of bonds he sold at par; and the first and worthless series he hypothecated for large sums of money. The equities of these victims, so far as they are based upon their innocence and sufferings, are about evenly balanced. But so far as equities arise from their acts and relations to the parties, the same cannot be said. These equities we will now proceed to consider.

It will be remembered that the Newark Savings Institution took Allen's stock as collateral security upon the loan made to him. It permitted him to have uncontrolled management of the stock and of the corporation, and until his failure revealed the paucity of his assets and his tortuous operations, it had made no effort to secure honest and competent management of the gas company. Before the bonds were issued it held in pledge all of Allen's stock, and had the power to prevent the fraud perpetrated by Allen in getting up the amended articles of incorporation, and in issuing the bonds. It well knew that, as the holder of the stock, it had the power to control the corporation. The duty rested upon it to

exercise the power; an omission to do so was negligence. It, in equity, can occupy no different position than Allen himself, having, as the holder of the stock in collateral security, permitted Allen to manage in his peculiar way the corporation. The reply to this position may be made that the savings institution was induced to pursue this course of neglect of duty, as holder of the stock, by confidence in Allen; that for such confidence it ought not to suffer, in view of the fact that the Charter Oak Insurance Company and other bondholders possessed like confidence in him, as is plainly shown by the fact of their purchasing the bonds upon inspection of a false copy of the deed of trust, taking his representation or the representation of his associates to be true. But the positions occupied by the parties respectively are different, and create different equities. The bondholders had no control of the corporation, and had the right to expect the holders of the stock would secure an honest management of its affairs. It was not their duty to attend meetings of the stockholders and elect officers; they had no business there, and could not do these things. The savings institution was charged with such duty, and could have elected honest officers. We conclude that, as it failed utterly to do its duty in this respect, and permitted Allen and his confederates to manage, unquestioned and uncontrolled, the affairs of the gas company, it must be regarded in equity as standing in Allen's shoes, and as having no rights other than Allen would possess if he were before this court claiming to protect the property of the gas company from the deed of trust in order to secure it to himself through stock held by him.

In support of this conclusion we may say that the savings institution entrusted its stock in the hands of Allen, and permitted him to become its trustee, without disclosing the nature of the trust or the *cestui que trust*, and in no way interfered with his management of the gas company in order to secure honesty therein. Surely the savings institution must not now

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deny the acts of its agent and trustee. His acts must be regarded as its acts.

Can it be doubted that Allen would not be heard should he come into a court of equity, asking that the bonds and deed of trust be set aside and held for naught, on the ground that they were executed through his own fraud—that the gas company possessed no authority to execute the instruments, and that, under the doctrine of *ultra vires*, they are void? We think not. Equity would say to him: "You cannot protect the property of the corporation, which you own through your shares of stock, from responding to the claims of men whom you have attempted to defraud. If the deed of trust is not enforced you will hold the property, and thus gain by your dishonest acts what you led others to believe you had secured to them." Equity will not be bound by the technical rules of the law, when these rules will permit fraud to triumph. The legal rules which regard a corporation as an artificial person, to be bound only by acts done in accord with its charter, which permit it to hold property as a natural person, and limit the interest of the stockholder therein to his shares, must all go down when they are attempted to be used as instruments of fraud by the dishonest, and stand in the way of equity.

There is no difficulty in this view when it is remembered that in this case equity has full jurisdiction of the gas company, which brings this suit, and of all its property which it seeks to discharge from the lien of the deed of trust, and that the bondholders are all before the court as parties. Of the stock of the company, six hundred and ninety-nine shares are now held by the Newark Savings Institution, or by a trustee for its benefit; one share by the president of the corporation, which, we understand, was assigned to him by the savings institution for the purpose of qualifying him to act as an officer; five shares by the secretary of the company; and all the other shares by Allen. As we understand the record, all the shares except the five last named stood in Allen's name when the

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bonds and deed of trust were executed. Equity will extend no protection to the stock held by the savings institution, the president of the gas company, or to that held by Allen.

The five shares held by the present secretary of the gas company were acquired by him after the failure of Allen, when the condition of the company's affairs must have been known at Des Moines. The secretary testifies that he lives in that city. Almost immediately after he acquired the stock he became a director and the secretary of the company. The prior holder of the stock lived at Des Moines, and it does not appear that he ever gave any attention whatever to the management of the corporation, or made any inquiry in regard thereto. The fraudulent proceedings we have detailed were carried on in the city where he lived, and no voice of alarm was raised by him. If he knew of these things, his silence was bad faith; if he was ignorant thereof, it was through negligence. In either case he cannot be protected in his interest in the corporation at the expense of others, who had not equal opportunity to discover the frauds, and who were authorized to rely upon the good faith and diligence of the stockholders and officers of the gas company. The secretary of the company, the present holder of these five shares, stands in no better condition.

The foregoing conclusion we reach upon the facts of this case, if not the reasoning upon which it is based, is, we think, supported by the following cases: *Merchants' Bank v. State Bank*, 10 Wall., 604; *Zabriskie v. The Cleveland, Columbus & Cincinnati R. Co.*, 23 How., 381; *Mead v. Merchants' Bank of Albany*, 25 N. Y., 143; *Barnes v. Ontario Bank*, 19 N. Y., 152; *N. Y. & N. H. R. Co. v. Schuyler et al.*, 34 N. Y., 30.

II. Counsel for plaintiff insist that under the statutes of Iowa the gas company did not possess and could not acquire the power to issue the negotiable bonds involved in this action. We have recently held differently. See *Thompson v. Lambert*, 44 Iowa, 239.

2. —: bonds:
negotiability.

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III. It is also insisted that the original articles of incorporation of the gas company prohibit indebtedness to exceed twenty-five thousand dollars, and that the amendment thereto, having been made without authority, is void. The bonds were issued in violation of the charter of the company, and are therefore not valid. The want of power of the company to issue the bonds may be fully admitted, but equity, for the reasons we have above given, will, under the peculiar facts of the case, enforce them.

IV. But it is urged that, as the stockholders are not parties to the action, the property of the gas company cannot be subjected to the superior equities of the ^{3. ———:} stockholders. bondholders. The rights of the bondholders must be enforced against the property of the corporation, if at all. The stockholders have submitted it to the management of the company's officers. They appear here, and, in the name of the corporation, set up the rights of the stockholders. These rights we hold have been lost to the stockholders by their bad faith and negligence. We discover no reason for holding that the stockholders are necessary parties to this action.

V. Fifteen bonds owned by the Charter Oak Life Insurance Company were not in its possession when the decree was rendered. The decree provides for proper steps to be taken to discover the bonds, and requires, if they are not produced, that security be given before the proceeds of the sale of the property applicable to these bonds be paid to the insurance company. We think the testimony is sufficient to support the finding of the court below that these bonds are the property of the insurance company, and the provisions made in the decree are amply sufficient for the protection of any person having a claim to them.

VI. The abstract upon which the case is submitted to us contains the following statement: "Before the judgment was announced, and before the decree was settled, the ^{4. ———: lien of attorney: priority of liens.} plaintiff, the Des Moines Gas Company, by its counsel, claimed that the money and assets in

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the hands of the company and its officers, at the time the receiver was appointed, was not subject to the mortgage, and that the decree should not order a dividend thereof among the bondholders for which the foreclosure might be made; and said counsel also claimed that they had a prior right to said moneys and assets, and that they had a lien thereon for their retainer and services in this cause, as well as for a general balance due them as such counsel, and especially they had a prior right thereto as against the Charter Oak Life Insurance Company and other bondholders, and asked that, in case the court should determine that the property was subject to the mortgage or trust deed, a referee should be appointed to ascertain and report the amount due plaintiff's counsel for all services rendered prior to the appointment of a receiver, and also for all services rendered, and for the general balance due them, as such counsel; and also asked that upon the coming in of such report of the referee the court would order the payment of such counsel fees out of the moneys, accounts, and other assets handed over to the receiver by the officers of the company at the time the receiver was appointed. But the court refused each and all of these requests, to which the plaintiff duly excepted."

The deed of trust conveys to the trustee all the property and rights of every kind, "and all rents, tolls, incomes, issues and profits to be had or derived from the same, or any part or portion thereof."

A question is presented to us involving the rights of the trustee to hold moneys found in the hands of the gas company at the time of the appointment of the receiver, being the proceeds of the income of the corporation, as we understand the facts, after the execution of the deed of trust. Counsel for plaintiff claim a lien upon these moneys for their fees in this case. An attorney has no lien upon money of his client, not in his possession, superior to the claim of a creditor who is seeking to subject it to his debt by legal proceedings. Such lien or a right to the money might exist if

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an appropriation or transfer by the client be shown. But the record fails to show either. It shows that the gas company denies the right of the court to appropriate the money to the bondholders, and that the attorneys claim a lien thereon, but nothing more. The attorneys failing to establish a lien upon the money, it must be disposed of either to the gas company or bondholders according to their respective rights.

The income of the gas company is covered by the deed of trust. This money is a part of that income, and has been reduced to the possession of the receiver by proceedings in this case for the purpose of appropriating it to the claim of the bondholders. The right of the bondholders to this fund, as against the gas company, cannot be doubted.

Cases cited by plaintiff's counsel in support of their views upon this point are not applicable, for the reason that they were determined upon facts involving the conflicting rights of creditors asserting liens and claims to incomes of corporations, and the provisions of the deeds of trust in some of the cases are not the same as the one involved in this suit.

In *Galveston Railroad Company v. Cowdry*, 11 Wall., 459, the contest was between the purchasers of the property of a corporation upon judgments and senior mortgages. The court interpreted the mortgages to provide that until demand was made for the income the parties receiving it were not bound to account therefor. No such demand was alleged in the pleadings. In the case before us the pleadings show a demand made for the property covered by the mortgage before suit, and the record discloses that a receiver was appointed into whose hands the moneys in question were paid, being part of the prior income of the gas company. This case is readily distinguishable from the one just cited. *Gilman et al. v. Ill. & Miss. Telegraph Co.*, 91 U. S. (1 Otto), 603, and *Am. Bridge Co. v. Heidlebach*, 94 U. S. (4 Otto), 798, cited by plaintiff's counsel, are cases in which judgment creditors, by proper proceedings, sought to subject the incomes of corporations to their claims. These incomes were earned before

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demand, or proceedings were instituted under the mortgages. These cases, as well as the other one just cited, are readily distinguishable from the one before us by the fact that the creditors contesting the rights of the mortgagees to the income had instituted proceedings to enforce their debts before the property and incomes had been taken under the mortgages. In this case the income of the gas company in question is in the hands of a receiver. It is claimed by attorneys for services rendered in this case. These services were mostly rendered, and of course the indebtedness of the gas company to them mostly arose, after the money was paid to the receiver. The claim of the attorneys wholly arose after the commencement of this suit, in which the bondholders seek to subject the income to their claims. We have seen that the attorneys have no lien upon the fund. They can have no equitable claim thereto which is superior to the rights of bondholders.

VII. The decree entered by the court below dismissed the petition of the trustee without prejudice to the rights of the holders of the bonds first issued and secured by the second deed of trust. It is insisted by the attorneys for the gas company that the dismissal should have been absolute. We think the decree is correct, in view of the circumstances of the case. While these bonds have scarcely a semblance of validity, yet we are not prepared to say that innocent holders could not enforce them against the gas company, in view of the fact that its stock is held by Allen and his assignees, who, as we have seen, are chargeable, so far as their stock is concerned, with liability for his acts, and by another, who is chargeable with notice of his operations and connection with the gas company. The point, we think, may well be left for settlement in other proceedings, if these bondholders see fit to institute them. But, as the evidence clearly shows that the value of the assets of the gas company does not equal the amount of the bonds enforced by the decree in this case, no such proceedings will probably ever be instituted.

AFFIRMED.

SUPPLEMENTAL OPINION.

BECK, J.—I. A petition for rehearing in this case was filed by plaintiff, which has required us to reconsider the record and the grounds of the foregoing opinion. While we are well satisfied with the conclusions we have announced, we esteem it proper to present further views in their support, and to make a correction of an error pointed out by counsel in the petition for rehearing.

In the next to the last paragraph of the statement of facts preceding the opinion an error appears touching the pleadings in the case, which is to the effect that the Newark Savings Institution is a party to the suit. The paragraph should read as follows: "The answer of the trustee and the cross-petition of the Charter Oak Life Insurance Company deny the frauds charged pertaining to the adoption of the amended or new articles of incorporation of the gas company. The plaintiff and the insurance company deny the allegations of the pleadings of the adverse parties inconsistent with their pleadings."

While we will attempt to offer no apology for the error, and do frankly confess that the degree of watchfulness which we ought to have exercised in using the names of the corporations concerned in the action would have saved us from the error of using one name for another, we are well satisfied that no one could have been misled by the opinion into supposing that the savings institution is a party to the suit. The preceding parts of the statement of facts give the pleadings of the parties, from which it may be seen that the savings institution is not a party. Other parts of the opinion show the same fact. The fourth point of the opinion answers an objection based upon the ground that the stockholders of the plaintiff are not parties to this action. The savings institution, it will be remembered, holds the stock of plaintiff originally issued to Allen. Very little attention to the opinion will enable the reader to correct the error without a word of

explanation, and we cannot believe that any one, before this correction, could have understood that we intended to state as a fact that the savings institution is a party to the action.

II. We will here add a few words in support of the doctrines of the foregoing opinion, which, probably, may prove to be the expression in other language of thoughts we have already advanced.

It must be remembered that the contest between the parties involves the property of the plaintiff, the gas company. The plaintiff, a corporation, as the representative of the rights and interests of the holders of its stock, insists that the bonds in question are void, and cannot be enforced against its property. The defendant the Charter Oak Insurance Company, the holder of the bonds, insists that they are valid, and the property of the plaintiff corporation is liable for their payment. The senior counsel for plaintiff, in his argument in the case, well states this thought in the following language: "The leading issues in the case are upon the validity of the bonds, and the priority of right to the property as between the Charter Oak and other bondholders, who claim to be innocent holders of some of the bonds, and the Newark Savings Institution, which is still the holder of the stock, having acquired the same in good faith, long prior to the issuance of the bonds."

The foregoing opinion is based upon the ground, among others, that the Newark Savings Institution has no other rights than would have been held by Allen had he never hypothecated the stock, and attempted to resist, through the gas company, as the owner of its stock, the enforcement of the bonds. We think this conclusion cannot be doubted. Now it must not be forgotten that this is an action in chancery in which the plaintiff, a corporation, is seeking to defeat the bonds in order that the stockholders may enjoy its property. Equity will not reward fraud by setting aside the bonds held by the Charter Oak Life Insurance Company, which is not chargeable with any fraud in their inception, to the end that

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the Newark Savings Institution, which stands in Allen's shoes, may have the benefit of the property of the gas company.

It is said that the insurance company is chargeable with notice of the irregularity of the bonds—if you please, of their absolute invalidity. For our present purpose, let this be admitted.

Suppose Allen, after committing all the acts charged, still holds the stock of the gas company, and, through that corporation, as the equitable owner of all its property, was assailing the bonds in order to set them aside, that he might enjoy the property, he, or the plaintiff for him, could not recover by showing that the insurance company, while not a party to the fraud, knew that the bonds were void. Equity would say to him and to the corporation, the plaintiff, which is holding and endeavoring to protect the property for him: "You knew these bonds were void; you put them on the market representing them as valid; the insurance company paid you the amount of their face for them; the money you applied to your own use; you will not now be heard to deny the validity of the bonds for the reason the insurance company knew or might have known that they were void; having received the money on these bonds as a loan, good conscience requires that the property of the corporation be held to pay them."

III. The second point of the foregoing opinion, it must be admitted, does not sufficiently answer the position of counsel; or rather clearness, in a measure, is sacrificed therein to brevity.

The point made by counsel, as stated in the petition for rehearing, is this: "A corporation for pecuniary profit cannot make a *negotiable* instrument, having the *attribute* of *negotiability*, so that a third person, the holder of it, would have any higher or different rights against the maker than the original payee." In other words, that the insurance company cannot in this case have the protection of the holder of negotiable paper under the law merchant. Now while it is stated in the foregoing opinion that both the insurance company and savings

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institution were ignorant of fraud, and had no actual notice of the invalidity of the bonds and stock held by each respectively, the conclusion reached is not based upon the ground that the insurance company was protected under the rules of the law merchant applicable to negotiable paper. It may be conceded that the insurance company takes the place of the party to whom the bonds were issued, or that the bonds were issued to it; but as it was not a party to the fraud, and in good faith advanced its money for the bonds in the way of a loan, which was appropriated to the uses of the equitable owner of the property of the gas company, that owner and his successors, who stand in his shoes, cannot protect the property from liability to the claim of the insurance company. *Thompson v. Lambert*, cited in the first opinion, holds that a corporation, in the absence of any inhibition in its charter or the statutes of the State, may borrow money and execute notes and mortgages therefor, and that a misappropriation by its officers of the money so obtained will not defeat the securities given for it. In the view we take of the case the bonds in question may be enforced, even if they should be held not to be negotiable.

No other question discussed in the petition for rehearing requires further consideration.

AFFIRMED.

WEITZ v. EWEN.

1. **Evidence: ADMISSION OF INCOMPETENT TESTIMONY.** The admission of incompetent evidence, tending to prove a fact established by other evidence which was not objected to, constitutes error without prejudice.
2. **Intoxicating Liquors: EXEMPLARY DAMAGES.** In an action by the wife for damages for the sale of intoxicating liquors, a verdict for exemplary damages is sustained by evidence showing that defendant sold liquors to plaintiff's husband when he was intoxicated, and when he was known by defendant to be in the habit of becoming so.

Weitz v. Ewen.

Appeal from Benton Circuit Court.

SATURDAY, DECEMBER 7.

THIS is an action to recover damages for injuries to her person and means of support, which the plaintiff alleges that she has sustained from the sale of intoxicating liquors to her husband by the defendant. The plaintiff claims one thousand dollars actual and one thousand dollars exemplary damages. The answer is a general denial. There was a jury trial, and a verdict and judgment for plaintiff for four hundred dollars actual and six hundred dollars exemplary damages. The defendant appeals.

Cooper & Tewksbury and J. D. Nichols, for appellant.

Johnson & Scrimgeour and Gilchrist & Haines, for appellee.

DAY J.—I. The plaintiff testified, among other things, as follows: "I have had ten children, eight of whom are now living. Four of them are minors. One is fifteen years of age, one is going on eleven, one is past seven, and the other going on five." The plaintiff was then asked this question: "What is the age of the next one?" Defendant objected on the ground that it is immaterial how many children there are, and what their ages are. The court held that while the plaintiff could not recover for loss of support on account of the children, yet that the number of her children might be taken into account in considering the question of exemplary damages, as the circumstances of a wrongful act may always be shown. To this ruling the defendant excepted. The witness answered: "Going on seventeen, I believe. So there are really five minors—three boys and two girls." This action of the court is assigned as error. In *Ward v. Thompson*, 48 Iowa, 588, the admission of evidence as to the children was sustained, but expressly upon the ground that defendant had been informed as to the chil-

L. EVIDENCE:
admission of
incompetent
testimony.

Weitz v. Ewen.

dren, and that there was danger the family would be broken up, and that his selling afterward evinced wantonness. There was no proof in this case that defendant knew anything about plaintiff's children. It is probable that, under the circumstances of this case, evidence of the number and ages of plaintiff's children is immaterial. But the condition of the record is such that the admission of this evidence cannot avail to reverse the case. As appears from what is above stated, the material portion of this testimony was admitted without objection, and no motion was made to exclude it. In addition to this, David Weitz testified, without objection, as follows: "Am the husband of plaintiff. Have eight children now living; the youngest four years, and the oldest twenty-three years old." In view of the testimony which was admitted without objection, no substantial prejudice could have been wrought by the plaintiff giving the age of one of the children.

II. It is claimed by the appellant that the actual damages allowed are excessive. We think the evidence abundantly sustains the action of the jury in this respect. Indeed, we think the preponderance of the evidence would have justified the jury in finding higher actual damages than they have allowed.

III. Objection is made to the concluding part of the seventh instruction, which is as follows: "It is also proper for you to consider what the earnings of plaintiff's husband would have been since October 16, 1874, but for intoxication on his part, habitual or otherwise, during that period, to which defendant contributed, if you find such intoxication, and that defendant did contribute to it." The objection to this instruction is that there is no evidence of the value of the earnings of plaintiff's husband to which the instruction can apply. It is true there is no evidence of the value of the earnings of plaintiff's husband as a day laborer. The evidence shows that he was not a day laborer, but that he cultivated a small farm of forty acres, which he owned. Proof was introduced

 Lytle v. Crum.

of the value of the products which he produced upon the farm, and thus there was some evidence of the value of his earnings to which the instruction might apply.

IV. It is urged that there is no foundation in the evidence for exemplary damages. Considerable evidence was introduced tending to show that the defendant frequently sold to plaintiff's husband intoxicating drinks when he was in a state of intoxication, and that he continued to sell him liquors, knowing that he was in the habit of becoming intoxicated. These circumstances authorize a verdict for exemplary damages, even if the unlawful sale of intoxicating liquors to plaintiff's husband, producing his intoxication, would not of itself do so—a point which is not in this case, and which we do not determine.

2. INTOXICATING
liquors:
exemplary
damages.

We discover no error in the record.

AFFIRMED.

 LYTLE V. CRUM.

1. **Replevin: INSTRUCTION.** In an action to recover possession of personal property, where the defendant alleged that he retained it under a contract giving him a special property therein, it was error to refuse an instruction that if the contract was established as alleged the plaintiff could not recover.

Appeal from Johnson Circuit Court.

SATURDAY, DECEMBER 7.

ACTION to recover the immediate possession of personal property. There was a trial by jury, verdict and judgment for the plaintiff, and defendant appeals.

Remley & Swisher, for appellant.

Edmonds & YOUNKIN, for appellee.

Lytle v. Crum.

SEEVERS, J.—The property in controversy consists of certain cattle which the defendant alleged, in his answer, were brought to the distillery of the Iowa City Alcohol Works to be fed, under a parol agreement that said cattle should be fed by the defendant, “and any excess of the value of said cattle, by reason of their increased weight or the advance in the price of the cattle above what the same were at the time the cattle were delivered to defendant, should be equally divided between the parties; and, further, that said cattle should not be sold or taken away until both parties agreed thereto.”

1. REPLEVIN:
instruction.

There was evidence tending to support the foregoing allegations, and, if the same were established to the satisfaction of the jury, they constituted a good defense we have no doubt. An instruction in substance was asked by the defendant that, if the jury found the contract to be as claimed by him, the plaintiff could not recover. This was refused, and none given embodying the same principle. Counsel for the appellee do not so claim, but insist—*First*. That no exceptions were taken to the refusal to give the instruction asked. The abstract states, immediately following the instruction and the statement that it was refused, that the defendant excepted. It is evident the exception was to the refusal to give the instruction, and that it was taken at the time, and was, therefore, sufficient. Code, § 2787. *Second*. That the instruction “does not take into consideration the alleged fact that defendant sent word to plaintiff to come and take the cattle away, and did not claim any lien or interest in the cattle on account of the contract under which they were placed in defendant’s possession.”

There is no allegation in the pleadings that the defendant waived his lien or right to retain possession of the cattle under the contract. We, therefore, infer counsel mean to be understood as saying there was evidence so tending, and the instruction was for this reason properly refused. Conceding this to be so, we have to say that if the cattle were improperly demanded the defendant was not compelled to say any-

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thing, but had the undoubted right to rely on the contract for his protection.

The defendant, or some one for him, wrote the plaintiff: "Please come down and tend to your cattle. We are going to stop the first of next month."

Within a few days the plaintiff went after the cattle, and was informed it had been arranged to run the distillery a month longer, and defendant refused to deliver plaintiff the cattle. At most we think the notice to take the cattle away, if such a construction can be placed thereon, was retracted, as it well might be, before acceptance. It is quite evident, we think, the case was not tried on the theory of a waiver or abandonment by the defendant of a special property in the cattle. The instruction was improperly refused.

Error is assigned on the instructions given, but we strongly incline to think the abstract fails to show that any sufficient exceptions were taken thereto.

REVERSED.

LATHROP V. HOWLEY.

1. **Tax Sale:** MUNICIPAL CHARTER: DEMAND. Where the charter of a city provided that demand of the city tax must be made a reasonable time before sale, if the supposed owner could be found in the city, *held*, that it was competent, notwithstanding a tax deed had been executed and was introduced in evidence, to show that no demand had in fact been made, and that, upon proof thereof, the deed should not be sustained.

Appeal from Clinton Circuit Court.

SATURDAY, DECEMBER 7.

THE plaintiff claims that he is entitled to the possession of lot number 4, in block 1, range 7, Buell's addition to the town of Lyons, under and in virtue of two tax deeds executed to

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him, and which are made exhibits to the petition. One of these deeds was executed on the 20th day of October, 1874, by E. R. Lucas, county treasurer, as successor of the marshal of Lyons city, on account of a sale made on the 25th day of March, 1871, by said marshal, for delinquent city taxes of 1870. The other deed was executed by E. R. Lucas, treasurer, as successor of the marshal of Lyons city, on account of a sale made on the 30th day of March, 1872, for the delinquent city taxes of 1871.

The defendant, for answer, among other things, alleged that the lot in question was sold by the marshal of Lyons city for the alleged delinquent taxes of 1870 and 1871, under the special charter of said city, providing that demand of the tax must be made a reasonable time before sale if the supposed owner be found in the city; that during the year 1870, and to the present time, defendant resided in Lyons city and upon said lot; that no demand was made upon him for the delinquent tax. The answer further alleges that E. R. Lucas, as county treasurer, had no authority to execute the deeds in question. The cause coming on for trial to the court, the plaintiff offered in evidence the tax deeds before referred to. The defendant objected. The objection was overruled and the deeds read in evidence, whereupon the plaintiff rested. The defendant testified that the taxes in question were never demanded of him. It was thereupon stipulated by the parties that E. R. Lucas was never elected nor appointed to the office of marshal of Lyons city, and that when the lot in controversy was sold for taxes, Lyons city was organized under a special charter, one of the provisions of which made the marshal the collector of taxes and authorized him to execute deeds for land sold for taxes, and that after sale of said lot by the marshal, and before the purchaser was entitled to a deed, said city, by a vote of its inhabitants, abandoned said charter, and became incorporated under chapter 10, title 4, of the Code of 1873. It was further admitted that the title to the lot is in the defendant, unless it has been transferred to the

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plaintiff by said tax deeds. The defendant then filed an amendment to the answer, alleging in substance that on the 7th day of October, 1872, said lot was sold by the county treasurer to the plaintiff for delinquent county and State taxes for the years 1871 and 1872; that afterward the plaintiff caused to be served on defendant, as the owner of said lot, a written notice, dated January 18, 1876, to appear and show cause why the treasurer should not execute to plaintiff a deed therefor; that on the 19th day of April, 1876, and within ninety days from the service of said notice, the defendant redeemed said lot by paying the county auditor fifty-one dollars and nineteen cents, which, on the 16th day of April, 1877, and after the commencement of this suit, the plaintiff accepted in full redemption of said lot. The defendant alleges that by these acts the plaintiff has waived all interest, right and title to said lot, by virtue of the deeds referred to in the petition, and is estopped from asserting or claiming any title thereto. The plaintiff demurred to this answer as follows:

“1. That said amended answer does not claim that any redemption of the land in controversy was ever made by defendant from the tax sales made by the marshal of Lyons city, in pursuance of which sales the deeds on which plaintiff's action is founded were made; nor does it claim that any redemption from said sales, or either of them, was ever offered or attempted by said defendant.

“2. Said amended answer does not show that the defendant has ever paid the plaintiff, or any one for him, the money which, under the law, he is obliged to do for the purpose of redeeming from said sale made by said city marshal, or that he ever offered or tendered the same to plaintiff.”

The court sustained the demurrer. The defendant excepted, and elected to stand by his answer and amended answer. The court thereupon rendered judgment for the plaintiff for the possession of the property as prayed. The defendant appeals.

N Corning, for appellant.

A. J. Leffingwell, for appellee.

DAY, J.—The special charter under which Lyons city was acting at the time when the sales under which the plaintiff claims title were made, contains the following provisions: “The marshal, or such person as, in case of his absence or disability, the council may appoint of record, shall be the collector of taxes. * * * When any person’s tax is not paid within a reasonable time after demand the collector may distrain upon personal property liable to taxation, and sell the same as the county collector may sell in like cases. Taxes on real property shall be a lien thereon, and it may be sold therefor if no personal property be found when the tax remains unpaid for four months after publication of the notice of the tax; but demand of the tax must be made a reasonable time before sale, if the supposed owner be found in the city. The collector shall execute and deliver to the purchaser a deed running in the name of the State.” Acts Fifth General Assembly, chapter 91. After the sale of the lot by the marshal, and before the purchaser became entitled to a deed, the city became incorporated under chapter 10, title 4, of the Code of 1873. Afterward the deeds in question were executed by the county treasurer. The appellant claims that the county treasurer had no authority to execute these deeds, and that they are, therefore, void. Upon the other hand it is claimed that the treasurer derived authority to execute the deeds under the provisions of section 495 of the Code. In the view which we take of the case we deem it unnecessary now to determine this question.

The special charter of Lyons city, under which the sales in question were made, provides that the collector’s deed shall have the same force and effect as the deed of the treasurer of the county, on sale for county and State taxes, under the law existing at the time. The charter provides, also, that demand

The State v. Smouse.

of the tax must be made a reasonable time before sale, if the supposed owner be found in the city. Now, while the deed, whether made by the collector or the treasurer, may be *prima facie* evidence of the regularity of all prior proceedings, it cannot, under the former decisions of this court, be conclusive evidence that the demand for the tax was made, as provided in the charter. It was admissible for the defendant, notwithstanding the introduction of the deed, to prove affirmatively that no demand for the tax was made upon him. The defendant testified that he had lived in Lyons city for about twenty-five years, that he knows the marshals of said city, and that none of them ever demanded the tax in question. The plaintiff introduced no proof upon this subject. It thus appears, affirmatively, that the charter was not complied with, and that the sales were not authorized. Upon the evidence introduced no judgment should have been rendered for the plaintiff. This disposition of the case renders a consideration of the ruling on the demurrer unnecessary. As the cause is not triable *de novo*, it must be remanded for a new trial.

REVERSED.

THE STATE V. SMOUSE ET AL.

1. **Criminal Law: INDICTMENT: PRACTICE.** An indictment presented in the proper court and properly filed therein, is not invalid because of an indorsement thereon reciting that it was found in another county.
2. ———: ———: **SURPLUSAGE.** Where an indictment charges two offenses, but alleges that one of them was committed in another county, the latter allegation constitutes mere surplusage.

Appeal from Washington District Court.

SATURDAY, DECEMBER 7.

THE defendants were indicted and tried for the crime of causing a nuisance. David Smouse, Sr., and David Smouse,

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Jr., were acquitted. C. W. Smouse was convicted. He now appeals to this court.

A. C. McGerigan, for appellant.

J. F. McJunkin, Attorney General, for the State.

ADAMS, J.—I. The indictment was found by the grand jury of Washington county. It contained, however, an indorsement in these words: “Presented to the District Court of Jefferson county, State of Iowa, in open court, by the foreman of the grand jury, in the presence of the whole grand jury, and filed by me, the clerk of said court, this 28th day of November, 1877.”

1. CRIMINAL
law: indict-
ment: prac-
tice.

“J. A. CUNNINGHAM,

“Clerk of the District Court of Washington county, Iowa.”

The defendants moved to set aside the indictment on the ground that it appeared upon its face that it had not been presented to the district court of Washington county, but had been presented to the district court of Jefferson county. The court overruled the motion, and the appellant assigns the same as error.

Section 4294 of the Code provides that an indictment, when found, must be presented by the foreman, in the presence of the grand jury, to the court, and marked “filed” by the clerk of the court. This means, of course, that it must be presented to the district court of the county in which the indictment is found, and marked “filed” by the clerk of such court. The indictment in question appears to have been filed by the clerk of the proper court, and it is not anywhere shown to us, nor claimed, indeed, that it was not presented to that court.

If it was so presented it is sufficient; and as the court must have known whether it was so presented or not we must assume that the court, in overruling the motion, acted upon its own knowledge that it was so presented.

The Attorney General suggests that probably a printed form of an indictment prepared for Jefferson county was used, and

that the necessary correction was not made in the name of the county. Whether the mistake occurred in this way or not we do not think the indictment should have been set aside by reason of it.

II. The indictment contains two counts. In one the defendants were charged with causing a nuisance by the use of a certain building in the county of Washington, State of Iowa, for the purpose of unlawfully selling intoxicating liquors. In the other the defendants were charged with causing a nuisance by the use of a certain building in the county of Jefferson, State of Iowa, for the purpose of keeping intoxicating liquors with intent to sell them. The defendants demurred to the indictment on the ground that in it the defendants were charged with the crime of nuisance committed in the county of Jefferson as well as the county of Washington. But the first count was good, and the demurrer, being to the whole indictment, was properly overruled.

If the defendants had been charged with two crimes committed in Washington county the whole indictment would have been bad for duplicity. But the charge of a crime committed in Jefferson county was mere surplusage.

III. In the fourth instruction the jury was told that all who aid and abet in the commission of a public offense are equally guilty, whether present and doing the acts constituting the crime or not, and that if they should find that the defendants were jointly engaged in business and kept liquors as charged, to sell in violation of law, and one of the parties made the sales, if any there were made, then all would be equally guilty. The giving of this instruction is assigned as error. The appellant contends that there was no evidence that his co-defendants were engaged in the business, and that the instruction should not have been given for this reason. Whether this be so or not, we see no reason why the appellant should complain.

IV. The fifth instruction assumes that there was evidence from which the jury might find that liquors were kept for sale

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in the grocery store of the defendants. The appellant contends that there was no such evidence. But one Ginther testifies to taking a keg of whisky to the grocery store, and to seeing it afterward there, and to seeing the appellant offer to treat with whisky. One Hughes also testifies to seeing the appellant sell whisky.

V. The defendants David Smouse, Sr., and David Smouse, Jr., moved the court to tax two-thirds of the costs to the county. The court overruled the motion, and the appellant assigns the same as error. David Smouse, Sr., and David Smouse, Jr., were acquitted, and no costs taxed to them. There is no reason why they should have made such motion, nor can the appellant complain that their motion was overruled. We see no error, and the case must be

AFFIRMED.

BALDWIN V. WHEELER ET AL.

1. **Assignment: FRAUD.** Evidence considered which was *held* insufficient to support a claim that an assignment of a bond for a deed was procured in fraud of the assignor.

Appeal from Cedar District Court.

SATURDAY, DECEMBER 7.

In 1852 the plaintiff became the owner of the north-east quarter, the east half of the north-west quarter, and the north-west quarter of the north-west quarter of section 29, township 82 north, of range 3 west, containing two hundred and eighty acres.

October 4, 1873, Ludwig Burning obtained a tax deed for all of said property, and on the 2d day of January, 1874, he conveyed it to J. W. Drury.

On the 8th day of June, 1874, the plaintiff entered into a contract with J. W. Drury for the purchase of said land, and

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procured from him a bond for a deed and a lease for said premises, the bond and lease being contained in one paper. The consideration named in the bond for the purchase of the land is three thousand three hundred dollars and thirty-three cents; one-third payable in two years, one-third in four years, and one-third in six years from the date of the bond, with interest at the rate of ten per cent per annum, payable annually. J. W. Drury binds himself in the penal sum of seven thousand dollars to execute and deliver to plaintiff a deed of quit-claim for the premises, if he shall well and truly pay the interest on each of the notes executed for the purchase money, annually, and pay the principal of each note as it becomes due. The lease provides that it is to be in force during the time given for the payment of the purchase money; "provided that a failure to pay the interest on each of said notes annually as it becomes due by the terms thereof, or a failure to pay the principal sum of either of said notes as it becomes due, or a failure to pay promptly any and all taxes and assessments levied or to be levied on said lands, or a failure to keep the fences and other improvements on said land in good repair, shall, at the option of said Drury, terminate this lease, and the bond of said Drury to convey said land shall be void, and the said Drury shall be under no obligation to convey said lands to the said Baldwin, but may enter into possession of said lands, and the said Baldwin shall forfeit all payments made by him. And it is especially understood that time is of the essence of this contract, and that the said Baldwin, by a failure to make any of the payments herein stipulated, or to perform any of his covenants and agreements herein set forth, forfeits all rights under this contract."

The plaintiff paid the interest due on this contract June 8, 1875. When the first note became due, June 8, 1876, for the purpose of raising money to pay it plaintiff executed to A. B. Oakley an assignment of this bond, as follows:

"For a valuable consideration I hereby assign and set over

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to A. B. Oakley all my right, title and interest in and to the within bond and lease from J. Wilson Drury."

Oakley not having the money to advance in person entered into an arrangement with H. C. Piatt to procure the money from him, and on the said 8th day of June, 1876, assigned his interest in said bond, as follows:

"For value received I do hereby sell, assign, transfer and set over to H. C. Piatt, of Cedar county, Iowa, all my right, title, interest, claim and demand in and to the within bond, lease and contract."

On this assignment Piatt advanced one thousand four hundred and forty-four dollars and forty-four cents, Oakley agreeing to pay therefor, at the end of the year, one thousand eight hundred and ninety-four dollars and forty-four cents. At the same time the following written contract was entered into:

"The undersigned here stipulates to and with A. B. Oakley, of Cedar county, Iowa, upon the payment of one thousand eight hundred and ninety-four dollars and forty-four cents, within one year from this date, to assign to him a certain bond given by J. Wilson Drury to Henry Baldwin, and by Baldwin assigned to Oakley; bond bearing date of June 8, 1874, for the conveyance of two hundred and eighty acres of land therein described, upon the payment of certain amounts therein named. It is further stipulated that in case any litigation arises touching this contract, whereby the said amount of one thousand eight hundred and ninety-four dollars and forty-four cents is not paid in one year from date, then said amount bears interest at ten per cent from maturity until paid, with an attorney's fee of one hundred dollars for any litigation that may arise under this agreement.

"H. C. PLATT."

Indorsed on this writing is the following:

"It is further agreed by the undersigned that in case the Henry Baldwin farm of two hundred and eighty acres should pass into the hands of H. C. Piatt absolutely, and become his

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property, then the said H. C. Piatt is to pay A. B. Oakley out of the sale of said farm eight hundred dollars.

"H. C. PIATT."

The money realized from Piatt was paid to Drury in satisfaction of the first note, and the interest at that time due. At the time of the assignment of the bond to Oakley, he and the defendant Wheeler were law partners. About the 11th of September, 1876, they dissolved partnership, and Oakley executed to Wheeler an assignment of his interest in the Piatt agreement, as follows :

"I assign all my right, title and interest in the within agreement to Charles E. Wheeler, and he is to pay this amount or not, as he sees fit, but to hold me harmless in the premises.

"September 11, 1876.

"A. B. OAKLEY."

On the 12th day of December, 1876, Henry Baldwin and Charles E. Wheeler entered into a written agreement, as follows :

"Know all men, by these presents, that for and in consideration of the covenants hereinafter contained I, Henry Baldwin, party of the first part, hereby sell and assign to Charles E. Wheeler, party of the second part, all my right, title and interest in and to a certain bond given by J. Wilson Drury to the said first party for the conveyance of a certain farm of two hundred and eighty acres therein described, bond bearing date of June 8, 1874; and said second party hereby agrees that, in consideration of the above, he, the said second party, will promise for the said first party an extension of time on a certain note given by said Baldwin to one Charles Smith, which note is secured by chattel mortgage.

"HENRY BALDWIN,

"CHARLES E. WHEELER."

Afterward Charles E. Wheeler bought the Smith note, referred to in the above agreement, and Baldwin executed a further assignment as follows :

"Know all men, by these presents, that in consideration of

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an extension of time on a note of five hundred dollars, given by me to Charles Smith, and now assigned to Charles E. Wheeler, I, Henry Baldwin, hereby sell and assign to the said Wheeler all my right, title and interest in and to a certain bond given by J. Wilson Drury to Henry Baldwin, bearing date of June 8, 1874, for the conveyance of two hundred and eighty acres of land therein described. Signed this 23d day of December, 1876.

“HENRY BALDWIN.”

On the 27th day of January, 1877, Wheeler and the defendant Samuel Keith entered into a contract as follows: “It is hereby stipulated and agreed by and between Charles E. Wheeler, of the county of Cedar and State of Iowa, of the first part, and Samuel Keith, of said county and State, of the second part, that, whereas, the said first party holds the right to redeem or pay for a certain farm known as the Henry Baldwin farm, and described in a certain bond for a deed given by one J. Wilson Drury (in whom the legal title now is) to the said Henry Baldwin, said bond bearing date of June 8, 1874, said right to pay for said farm and take a deed for the same belonging to Wheeler, by virtue of a certain contract given by one H. C. Piatt to one A. B. Oakley, and by Oakley assigned to said Wheeler, and also by virtue of an assignment of the before mentioned bond for deed by the said Henry Baldwin to the said Charles E. Wheeler: It is, therefore, stipulated and agreed that the said Wheeler hereby sells, assigns, and forever quit-claims all his right, title and interest in the before mentioned bond for a deed, and in all the said farm of two hundred and eighty acres, to the said Samuel Keith, and hereby empowers said Keith to take a deed for the whole farm of two hundred acres, as stipulated in the before mentioned bond for deed given by Drury to Baldwin; and it is hereby stipulated on the part of said Samuel Keith that, for and in consideration of the foregoing, the said Keith shall pay the sum of four thousand dollars on the one claim now held by H. C. Piatt, and the two notes yet unpaid, given

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by Henry Baldwin to J. Wilson Drury—the amount yet due, after the payment mentioned, on said claims, whatever it may be, to be paid by said Wheeler; all of the above payments to be made by the parties themselves at any time within thirty days from the date of this contract. And it is further stipulated that the said Keith shall pay the said Wheeler, in notes secured by mortgage (notes to be on one Peter Onstott and one J. W. Thomas), the sum of thirty-four hundred dollars, and a note on himself, due on or before two years from this date, for fourteen hundred dollars, the receipt of which note is hereby acknowledged. And it is further stipulated that, whereas, there is a part of said farm of two hundred and eighty acres now contracted to said Onstott and Thomas, now, therefore, the said Keith agrees to and with the said Wheeler that he (Keith) will give said Wheeler a quit-claim deed for said contracted land, to-wit: The north-west forty of said farm of two hundred and eighty acres, and the two forties next east of said north-west forty of said farm; and the said Wheeler agrees to and with the said Keith to make warranty deeds for said four [three?] forties to the said Onstott and Thomas, as soon as Keith gives deed to Wheeler; all the foregoing to be in thirty days from this date. The taxes due on said farm to be paid in equal parts by Keith and Wheeler.” Under this agreement Keith advanced the money to pay Piatt; and to pay Drury the amount and interest of the two remaining notes.

On the 29th day of January, 1877, Piatt assigned all his interest in the bond in question to Charles E. Wheeler, and authorized him to receive a deed for the land upon complying with the terms of the bond.

On the 30th day of January, 1877, J. Wilson Drury conveyed all of said land, by quit-claim, to Samuel Keith.

On the 1st day of February, 1877, Samuel Keith and wife executed to Charles E. Wheeler a mortgage on the north-east quarter of section 29, for one thousand four hundred dollars. On the same day Samuel Keith executed to Charles E. Wheeler

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a quit-claim deed for the east half and the north-west quarter of the north-west quarter of said section. On the same day Wheeler and wife executed to J. W. Thomas a warranty deed for the east half of the north-west quarter, and to Peter Onstott for the north-west quarter of the north-west quarter of said section. On the same day Thomas executed to Wheeler a mortgage on the land conveyed to him to secure one thousand three hundred dollars, and Onstott executed to Wheeler a mortgage upon the land conveyed to him to secure seven hundred dollars.

When Baldwin assigned to Oakley there was an unsatisfied mortgage to David Hyde on the north-east quarter of said section, dated March 10, 1860, for nine hundred and seventy dollars, and another mortgage on said quarter section to Emma Hyde, dated January 8, 1867, for one thousand seven hundred and eighty dollars. The north-west quarter of the north-west quarter of said section was conveyed by sheriff's deed to C. T. Wheeler, March 4, 1873. The value of the two hundred and eighty acres is about ten thousand dollars.

The plaintiff alleges that the assignment was made to Oakley as plaintiff's agent and attorney, in order that he might borrow money to pay off the first Drury note, and pledge the bond as security for one year; that it was agreed between plaintiff and Oakley that if plaintiff could not raise the money to redeem the bond by June 8, 1877, then Oakley might redeem, and, by paying off Drury, have the place; that pursuant to this agreement Oakley, as the agent and attorney of plaintiff, borrowed the sum before referred to of H. C. Piatt, assigned the bond as security for the loan, and paid off the first payment and all the interest to Drury; that at the time Oakley assigned the Piatt agreement to Wheeler, Wheeler was fully informed of Oakley's agreement, and was merely substituted in Oakley's place; that Wheeler represented to plaintiff that it would be better to owe all the money in one place, and that if plaintiff would assign the Drury bond for a deed of the premises, Wheeler would get the money and pay

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off all the indebtedness on the place, and wait five years at ten per cent; that plaintiff did not read the assignment, and Wheeler did not read to plaintiff that part of the assignment which says that the consideration was to get an extension of time on the Smith note, and that Wheeler fraudulently inserted that clause in the assignment without plaintiff's knowledge or consent; that Wheeler, disregarding his agreement, confederated with the defendant Keith to pay off the indebtedness and take the land to themselves, and that Keith, Thomas and Onstott all had notice of plaintiff's rights in the property.

The plaintiff prays that the deeds from Drury to Keith, from Keith to Wheeler, and from Wheeler to Thomas and Onstott, be set aside, and the plaintiff reinstated in all his rights in said property; and, if plaintiff is not entitled to this relief, that he have judgment against Wheeler for seven thousand dollars. The court dismissed the plaintiff's petition as to the defendants J. W. Thomas and Peter Onstott, and decreed that the defendant Samuel Keith holds the rest of the land in trust for plaintiff, and that he convey the same to plaintiff upon the payment to Keith of the sum of one hundred and eighty-nine dollars and fifty-eight cents, and that, if this sum be not paid in sixty days, a special execution issue for its collection. The defendants Keith and Wheeler appeal.

Wolf & Landt, for Keith, appellant.

Piatt & Carr, for Wheeler, appellant.

Cook & Richman, for Onstott and Thomas.

Oakley & Jamison, for appellee.

DAY, J.—It may be conceded that the assignment was made by plaintiff to Oakley for the purpose and under the circumstances alleged by plaintiff; but from a
1. ASSIGNMENT: fraud. careful examination of the testimony, we feel constrained to hold that the claim of plaintiff respecting the

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assignment of the bond to Wheeler is not sustained by the evidence. The assignment from Baldwin to Wheeler expressly states that it is made in consideration of Wheeler agreeing to procure an extension of time on a note and mortgage for five hundred dollars given to Charles Smith. The plaintiff does not himself testify with any positiveness or distinctness to any fraud perpetrated upon him. He admits that the assignment was handed to him; that he looked it over the best he could, and tried to read it as understandingly as he could. Respecting the assignment, Wheeler testified as follows:

"On the 12th of December, 1876, I took a new assignment of the Drury contract from Baldwin. The assignment and that writing expressed the whole contract in relation to the assignment. * * * * There were several present. I remember S. L. Lage, W. S. Angood, and James Carlin were present in the office, and I think others. The assignment was read over to Mr. Baldwin by myself and W. S. Angood. After I wrote it I read it aloud to Mr. Baldwin, and handed it to him and told him to read it. He read a part—I should think more than half—of it aloud, then said he could not see it very well, and handed it to W. S. Angood, who began at the beginning and read it all to Mr. Baldwin, who then signed it."

This witness further testified that there never was any conversation between Baldwin and himself in which it was agreed or suggested that, in taking the assignment of the Drury bond, witness was acting as agent or attorney, or in any way, for Baldwin, or that the assignment should be for any other purpose than as therein expressed, and that the only consideration for the assignment was the purchasing of the Smith note and mortgage, and giving plaintiff an extension of time thereon.

W. S. Angood, who was present when the assignment was executed, testified as follows: "I recollect of hearing a conversation between Baldwin and Wheeler on that day in rela-

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tion to assigning the Drury bond to Wheeler. Baldwin wanted to know if he could get him an extension of time on the Smith note. Wheeler told him he would get extension by getting the note as pay for the bond that he assigned. Baldwin said he would. Wheeler drew up the assignment and read it to Baldwin, and handed it to Baldwin and asked him to read it himself. Baldwin had it in his hands awhile, then said he could not read it very well himself, and asked me to read it for him. I did so, and handed it back to him. Mr. Baldwin said it was all right, and signed it. * * * * * There was nothing said about Baldwin assigning the bond to Wheeler to enable him to borrow money, or anything to that effect, nor anything about the Smith note going in as indebtedness against the farm, or Baldwin's having five years to pay it in."

James Carlin testified as follows: "I was in Wheeler's office December 12, 1876. I went there that day to pay him a note I owed him. Mr. Angood and Mr. Baldwin were in the office when I went there. I think they were waiting for Mr. Wheeler, who had just gone outside to see somebody. I heard Mr. Wheeler and Mr. Baldwin talking about the Smith note. Mr. Wheeler said he would get him an extension of time if he had to trade with Mr. Smith. Mr. Baldwin was to give Mr. Wheeler a bond which they had in their hands for getting the extension. An assignment was made and read over. I think Wheeler had it and gave it to Angood, who read it over to Baldwin and explained it to him, so I could understand what it was. I did not hear anything that day about Wheeler acting as agent for Baldwin to borrow money for him, or anything of the kind."

Baldwin is without corroboration except from the deposition of Philip Farrington, which was suppressed. Even if this be considered, there is a very clear preponderance of evidence that the assignment was fully and fairly read over to Baldwin, that he executed it understandingly, and that the real and only consideration is expressed therein.

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It is said that it is unreasonable that Baldwin would give up his interest in so valuable a property for the mere extension of time on a note of five hundred dollars. But it must be remembered that forty acres of the land had been sold at sheriff's sale, and that one hundred and sixty acres of it are very heavily incumbered by mortgage. These mortgages and this sheriff's sale would attach to the land whenever the title became vested in Baldwin. Besides, there was a large amount of taxes delinquent. The land was not worth very much more than the liens against it. We are satisfied from the whole testimony that Baldwin had despaired of ever being able to discharge the liens and hold the land, and that he regarded the procuring of an extension on the Smith note, which was secured by a chattel mortgage, as really that much gained. We think the assignment from Baldwin to Wheeler of the Drury bond expresses the only consideration upon which it was executed; that the evidence shows there was no fraud in its procurement, and that it divests Baldwin of all interest in the property. It follows that the judgment of the court below is erroneous, and that it must be

REVERSED.

RICKABAUGH V. BADA.

1. **Replevin: OFFICER CANNOT RECOVER FOR DEFENDING.** An officer cannot recover for his time and expenses in successfully defending in an action for replevin for personal property which he had levied upon, and with respect to which the plaintiff in the replevin suit had served no notice of claim of ownership.

Appeal from Mills Circuit Court.

SATURDAY, DECEMBER 7.

ACTION to recover for loss of time and expenses incurred in an action in replevin, in which this plaintiff was defendant,

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and this defendant was plaintiff. There was a trial by the court and judgment for the defendant. The plaintiff appeals.

Kelly Bros., for appellant.

Hale, Stone & Proudfit, for appellee.

ADAMS, J.—The action in replevin was brought by the appellee to obtain possession of certain personal property which Rickabaugh had levied an execution upon as constable, and which Bada claimed by virtue of a chattel mortgage executed to him by the execution debtor. Rickabaugh defended in that action, and was successful. In doing so he expended forty-five dollars for attorney's fees, and expended also time and money of the value of twenty-eight dollars and eighty cents. It does not appear that the mortgage was not valid, but Bada served no notice of his ownership of the property until he served his writ of replevin, and he failed in his action in replevin because of his failure to serve such notice before the commencement of his action.

Rickabaugh seeks to recover upon the ground that it was necessary for him to defend in the action in replevin, and to expend the time and money which were expended. While it is true that the time and money were expended after Bada gave notice of his ownership, yet it is said the necessity for such expenditure had been created before. Section 3055 of the Code provides that an officer levying an execution on property in possession of the execution debtor shall be protected against liability by reason of such levy, notwithstanding the property may belong to some person other than the execution debtor, until he shall receive written notice of the true ownership. It is insisted by the appellant that, unless he can be permitted to recover for time and money expended, where the necessity for such expenditure was created before such notice, he will not be protected against all liability by reason of the levy as the Code provides.

In our opinion the appellant misconceives the meaning of

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the provision in question. The liability referred to is a liability to the owner of the property. The provision was sufficient to prevent Bada from recovering damages for the wrongful detention. It was also sufficient to entitle Rickabaugh to recover his costs in the action in replevin. But it does not appear to us that it is sufficient to enable him to maintain an action like the present. If it be so we do not see why he may not maintain another action for the time and money expended in this action, and so on *ad infinitum*.

It is true that under the view which we take an officer is not fully protected. He is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the execution debtor, or on which the execution creditor directs him to levy, unless he has received notice in writing from some other person, his agent or attorney, that such property belongs to him. Code, § 3055. Under this provision it is evident that he may be drawn into costs in an action by the claimant unless he appears and defends. But this is incident to the business which he undertakes to do. The law does not ordinarily allow a recovery for attorney's fees, or for time expended in prosecuting or defending an action. In our opinion the successful party in an action in replevin is not entitled to recover damages except so far as he may do so in the action itself, and we think the rule is not different when the successful party is an officer defending himself against costs.

AFFIRMED.

Francis v. Bentley.

FRANCIS V. BENTLEY.

1. **Promissory Note: GUARANTOR: JURISDICTION.** In an action before a justice of the peace a notice that the plaintiff claimed of the defendant on a promissory note, although the latter was merely guarantor of the note, was *held* to be sufficient.

Appeal from Winneshiek Circuit Court.

SATURDAY DECEMBER 7.

THE plaintiff commenced an action before a justice of the peace against W. J. and W. H. Bentley, by serving upon them a notice signed by the justice, as follows:

"You are hereby notified that the above named plaintiff claims of you the sum of forty-four dollars and ninety-two cents, with interest since February 5, 1875, as justly due him from you on a promissory note."

The note which was filed with the justice is as follows:

"\$44.92.

FEBRUARY 5, 1875.

"For value received, on or before the 1st day of April, 1875, I promise to pay G. F. Francis, or order, forty-four and 92-100 dollars, with interest thereon from this date until paid, at the rate of ten per cent per annum, payable at Decorah.

W. J. BENTLEY."

On the back of this note is the following indorsement:

"February 19, 1876. For value received I hereby agree to see the within note paid.

W. H. BENTLEY."

No petition was filed. Judgment by default was rendered against both maker and guarantor, from which the guarantor alone appealed.

In the Circuit Court the defendant was permitted to answer, which he did as follows: "Defendant says that he never signed, executed, or delivered said note, or that any consideration whatever passed or moved from plaintiff to any person whatever therefor."

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The cause coming on for hearing the plaintiff offered in evidence the note and the indorsement thereon. The defendant objected to the evidence as incompetent, as the defendant had not signed the note, and the declaration of plaintiff claims upon the note, and not upon the contract of guaranty. The court overruled the objection, and admitted the note and the indorsement in evidence, to which the defendant excepted.

This being all the evidence introduced, the court rendered judgment for plaintiff for fifty-nine dollars and four cents.

The defendant appeals.

O. J. Clark, for appellant.

E. E. Cooley, for appellee.

DAY, J.—The defendant claims that the cause of action against W. J. Bentley is upon the note, and that against W. H. Bentley is upon a separate written contract, the contract of guaranty; that the causes of action should be presented in two distinct counts; and that the notice given in the justice's court does not sufficiently apprise the defendant of the cause of action against him. If this suit had been commenced in a court of record the objections of defendant would be well taken; but the technical rules of pleading which prevail in courts of record are not applicable to proceedings in justices' courts. To apply such rules to proceedings in those courts would in a great measure deprive litigants of the benefit of a tribunal which was designed to furnish a cheap and speedy means of determining controversies involving small amounts. Section 3518 of the Code provides that where actions are commenced in a justice's court "no petition need be filed, * * * * but the notice must state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him." The notice in this case complies with this provision. It advises the defendant generally that a claim is made against him upon a promissory note. The notice does

1. PROMISSORY
note: guar-
antor: juris-
diction.

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not state that the claim is made against the defendant as the maker of a promissory note. Now, while the claim is really against the defendant as a guarantor, it is still true that, in a certain sense, it is upon a promissory note. The contract is written upon the note, and the introduction of the note, with the contract upon the back, is necessary to make out the plaintiff's case. The production of the guaranty alone would not entitle plaintiff to recover, for from it the extent of the defendant's liability could not be determined. It cannot be reasonably supposed that the defendant was not advised, from this notice, of the real nature of the claim made against him, even without an examination of the note, which was filed with the justice. If he had taken the precaution to examine the note, as he might have done, he could not have remained ignorant of the nature of the claim. In view of the liberal construction which should be placed upon proceedings in justices' courts, we feel clearly of opinion that the judgment is right.

AFFIRMED.

MERRILL V. WELSHER ET AL.

MERRILL V. FARIS.

1. **Taxation: IN AID OF RAILROAD.** A tax to aid in the construction of a railroad was voted in the township of K., to be expended in that and two other townships specified. Double the amount of the tax was expended by the company in constructing the road through K., but nothing was expended in either of the other townships: *Held*, that the three townships should be regarded as a unit, and that the tax was not forfeited by the failure to expend any part of it in either of the other townships specified.
2. ———: ———: **SURVEY.** The survey of the line of a road previous to the voting of a tax does not constitute a representation respecting the line of the road which is binding upon the company, or upon which the tax payer is authorized to rely.
3. ———: ———: **SUSPENSION OF WORK.** A suspension of work upon the road for three years and ten months was *held* not to work a forfeiture of the tax.

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4. ———: ———: ESTOPPEL. Nor would the company be estopped to collect the tax because it had advised, when the work temporarily ceased, that the collection of the tax should be suspended.
5. ———: ———: CERTIFICATE. That the certificate of compliance by the company with the conditions of the tax was not executed in accordance with any order of the trustees, made at a meeting thereof, was *held* not to invalidate the tax, the certificate having been duly signed.
6. ———: ———: ASSIGNMENT. A tax voted to aid in the construction of a railroad is assignable.

Appeal from Marion District Court.

MONDAY, DECEMBER 9.

THESE cases are submitted together as arising out of the same state of facts and involving substantially the same questions of law. The plaintiff holds by assignment a claim for a tax voted in 1870 in Liberty and Knoxville townships, in Marion county, to aid in the construction of the Albia, Knoxville & Des Moines Railroad.

In 1876 the board of supervisors, regarding the tax as forfeited and subject to be abated, passed a resolution declaring it abated, and directing the county treasurer not to collect it. The first action was brought to obtain a writ of *certiorari*, to test the jurisdiction and authority of the board to abate the tax. The second was brought to obtain a writ of *mandamus* to compel the collection of the tax.

The tax voted in Liberty township was to be expended in that township. The tax voted in Knoxville township was to be expended in Knoxville, Indiana and Pleasant Grove townships. Prior to August 1, 1871, the company expended in Liberty township about two thousand dollars, and in Knoxville township about thirty-two thousand dollars. Work was then suspended until May 20, 1875, when it was resumed and prosecuted to completion through Liberty township and to the city of Knoxville, in Knoxville township. Nothing was done in Indiana township. The original survey ran through

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the township, but after the tax was voted a resurvey was made, and the township is left out of the line of the road as built. Pleasant Grove township is in the line of the road as projected, but it has not yet been reached. At the time the work was suspended the company advised that the collection of the tax should be suspended, and no further collections were made. A portion of the tax, however, had been paid. After it had remained in the treasury two years, without being earned by the company, actions were brought by the persons who had paid the tax to recover it, and judgments were rendered in their favor.

In completing the work subsequently through Liberty township, and to the city of Knoxville, in Knoxville township, the company expended in each township double the amount of tax voted. In August, 1875, the trustees of Liberty township certified that the tax voted in that township had been earned, and that the company had become entitled thereto. In November, 1875, the trustees of Knoxville township certified that the tax voted in that township had been earned, and that the company had become entitled thereto. The certificates were in due form, but no previous order or resolution of the trustees had been passed authorizing the issuance, nor does it appear that the certificates were signed at a meeting of the trustees. The certificates were presented to the county treasurer, R. M. Faris, defendant herein, who published the notices provided in such cases, to the effect that the tax had been duly certified by the trustees as earned by the company, and that the same was due. After the passage of the resolution of abatement the treasurer refused to proceed. Upon the foregoing facts the court rendered judgment for the defendants. The plaintiff appeals.

T. J. Anderson, Stone & Ayres, Barcroft, Given & Drabelle and Wright, Gatch & Wright, for appellant.

J. D. Gamble and H. G. Curtis for appellees.

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ADAMS, J.—The first question presented is as to whether the fact that the company expended nothing in Indiana and

1. TAXATION:
in aid of rail-
roads. Pleasant Grove townships should defeat the collection of the tax voted in Knoxville township. If it should, that would dispose of the Knoxville tax, unless the certificate of the township trustees is to be regarded as having the force of an adjudication to such extent that the defendants cannot be allowed to go behind it. The defendants' theory is that where a tax is voted to be expended in more than one township, as in this case, some part of it must be expended in every township or the whole will be forfeited. Strictly speaking, a tax cannot be expended until collected. If, then, the actual expenditure of it in a given place is a condition precedent to its collection, the provision for aiding a railroad by taxation would be nugatory. But the meaning of the statute, doubtless, is that the tax shall be first earned by the company by the expenditure of the requisite amount within the territory specified in the notice of election. The identical money received from the tax passes absolutely into the control of the company, and may be expended wherever the company sees fit.

In this way the provision of the notice is substantially, although not literally, complied with. But the defendants contend that even under this view the company never became entitled to demand the collection of the Knoxville tax. They say that it is not sufficient that double the amount of the Knoxville tax has been expended in Knoxville township; they say that the tax will not be collectible until something shall be expended by the company in each of the other townships. Pleasant Grove township has not yet been reached. Indiana township has been left out of the line of the road, and has been passed. The fact, however, that Indiana township has been left out and passed is of no greater significance, in the determination of the question before us, than the fact that Pleasant Grove township has not been reached. It is either necessary that there should be an expenditure in each one of

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all three, or else it is sufficient that the requisite amount has been expended in one. It might at first seem sufficient to say that if the whole expenditure has been in Knoxville township, that should be sufficient to entitle the company to the Knoxville tax. But it appears that Indiana and Pleasant Grove townships voted a tax to be expended in the same three townships, and the defendants maintain that, if the Knoxville tax is collectible, the Indiana tax and Pleasant Grove are also, provided double the amount of tax voted in the three townships has been expended in Knoxville township. It is not easy to evade this conclusion.

The provision in the notice under which the tax was voted, that it should be expended in the three townships, must, we think, mean either that there should be some expenditure in each, or that the expenditure should be within the territory of the three townships regarded as a unit. It is not to be denied, we think, that, looking as a mere grammarian at the words used in the notice, the former would be the more natural construction; but there are other considerations in favor of the latter, and in our opinion they are of controlling importance. According to the defendants' theory, if the company had expended one cent in Indiana township, and one cent in Pleasant Grove township, it would have satisfied the terms of the notice, and the objection would have been obviated upon which they rely.

The objection, then, is purely technical, and of the two constructions of which the language is susceptible we are asked to adopt the one which shall involve a holding that there was a design to provide for something of no appreciable importance. At this point we are met by an argument on the part of the defendants to the effect that while it is true that it would have been of no appreciable importance to the tax payers of Knoxville township, so far as the expenditure itself is concerned, if an infinitesimal amount had been expended in each of the other townships, instead of the whole being expended in Knoxville township, yet if some amount

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was to be expended in each of the other townships, it would have necessitated the running of the road there. So the object of the provision in regard to expenditure, construed as meaning that some part, however small, should be made in each township, is not to secure the expenditure for its own importance, but merely to fix the line of the road. This view might appear to have some force, but for the fact that the statute requires that the notice shall expressly specify the line of the road. In complying with this provision it must be presumed that the words used defined the line of the road as specifically as was deemed expedient. In the notice in question the line of the road was specified as running from the city of Albia, in the county of Monroe, by the way of Knoxville, in the county of Marion, to the city of Des Moines, in the county of Polk.

If the trustees of Knoxville township had desired to provide that the road should run through Indiana and Pleasant Grove townships they should have inserted the provision among the words used expressly to specify the line of the road. This is especially so, as the statute requires the line of the road to be expressly specified. We are not allowed to add to the specification expressly so made in obedience to the statute by erecting some other provision into a specification which can have that effect only by indirection. As, then, a provision for some expenditure in each township would be useless for the direct purpose of the expenditure, and not proper for the indirect purpose of controlling the line, the words used in the notice must be held not to be a provision for some expenditure in each township, but for expenditure in the territory embraced in the townships regarded as a unit. The road was to run by the way of the city of Knoxville, in Knoxville township. Indiana township, it appears, lies on one side and Pleasant Grove on the other. The tax payers of Knoxville township must be understood as designing to limit the expenditure of their tax to the three townships, not for the purpose of fixing the line of the road, for it was to run by Knoxville, as

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otherwise specified, but for the purpose of aiding in and securing the construction of that part of the road, rather than some part more remote. This, we think, is the fair meaning of the words used, construed with reference to the context, and the only object that could properly be designed to be accomplished.

But it is insisted by the defendants that at the time the tax was voted the road had been surveyed and the line located 2. —: —: through Indiana and Pleasant Grove townships; survey. that the tax payers had a right to assume that it would be built as located; and, inasmuch as the tax was voted under a representation as expressed in the original survey, it should not now be collectible. It is said that we are not to inquire whether the tax payers have been prejudiced by the relocation; that this is a matter of strict right.

If the tax payers had wished to confine the building of the road to the line as surveyed, they should have expressly so provided. It was known to them that railroads are not always built on the line first surveyed. Improvements are sometimes made on the original survey. Changes are made which are called for by engineering considerations, which at first were overlooked or not properly estimated. Within the limits of the line as specified, we think the company had a right to assume that it was designed to give it the privilege of deviating from the original survey where the interests of the company seemed to require it. We think, then, that the collection of the Knoxville tax cannot be defeated by the fact that the road has not and will not be built through Indiana township as originally surveyed. We may, then, treat the tax the same as if it had been voted to be expended in Knoxville township, where the whole expenditure has, in fact, been made. The tax in Liberty township was voted to be expended there, and the expenditure has been made there. Whatever other objections are urged apply equally well to the tax in each township.

III. One objection urged is that there was a cessation of

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work for three years and ten months. The defendants speak
3. —: —: of it as abandoned. As the work was resumed,
^{suspension of}
^{work.} we must regard the cessation as having taken
place subject to the contingency of resumption. Whatever
doubts the company may have had, if any, about its ability to
resume, will not of themselves, we think, prevent the collection
of the tax. The most, then, that can be said is that the work
ceased for a time or was suspended. Is this a sufficient
defense? The statute does not provide that a railroad com-
pany, in order to entitle itself to a tax voted, shall be engaged
in the prosecution of its work every day, month or year. If
we should hold that it is necessary, we should add a dis-
tinct provision to the statute by judicial construction. There
is, it is true, a four-year limitation provided in regard to a
suspension of the collection of the tax, by reason of the non-
fulfillment by the company of a special condition or agree-
ment in writing, as provided by chapter 2 of the Laws of the
Fourteenth General Assembly. Such limitation is provided
in chapter 48 of the Private and Local Acts of 1874. Where
the company agrees in writing to do something as a condition
of receiving the tax, it is the duty of the township trustees
to certify the agreement in writing to the county treasurer,
and thereupon the collection of the taxes is to be suspended
until it shall be certified to the treasurer, by the trustees,
that the company has complied with all statutes and agree-
ments; and if the collection of the tax is thus suspended for
four years from the date of the levy, the tax may be deemed
forfeited, and the supervisors may declare it abated. The
supervisors declared the tax in this case abated, and they
claim that they were authorized to do so under the statutes
above referred to. When the tax was levied does not appear,
nor does it appear when the township trustees' certificates
were presented to the county treasurer, showing the comple-
tion of the work; but, assuming it to be more than four years
between date of the levy and the presentation of the trustees'

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certificates to the county treasurer, we do not think that the collection of the tax can be defeated upon that ground.

The company entered into no special agreement in writing, the performance of which was a condition precedent to its right to receive the tax. The agreement relied upon is the provision in the published notice under which the tax was voted that it should be expended in the three townships. The defendants say that if the company claims the tax it became a party to this provision, and must be regarded as having agreed to expend the tax in accordance with it. It did not, as we have seen, make an expenditure in each one of the three townships, and it may be conceded that it did not make such expenditure anywhere within the three townships as to entitle it to receive the tax within four years from the date of the levy. But the company's failure was simply a failure to build the road. It was not a failure to perform a special agreement, for there was no special agreement. The designation in the notice of a place where the tax should be expended did not make a special agreement. Such designation is made properly every time a tax is voted, because the statute provides that it shall be. This, then, is an ordinary case. The tax was not collectible sooner simply because the company did not sooner do the requisite amount of work at the place where it was to be done to entitle it to the tax. The company may have a good excuse for not completing its road or doing a certain amount of work at a certain place within four years, and not have a good excuse for neglecting to perform its special agreements after the road is completed, or the requisite amount expended to entitle it to a given tax. We are of the opinion, then, that the action of the board of supervisors in abating the tax was without authority.

It is insisted by the defendants that the company should be held to be estopped by its own acts from enforcing the collection of the tax. The company, it appears, when the work was suspended, advised that the collection of the tax should be suspended. The defendants

4. —: —:
 estoppel.

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say that they shall be greatly wronged by this advice, unless the company is now held to be estopped by it. The argument is that if the tax had been collected it would have become repayable to the tax payers at the end of two years, if not earned by the company. Some taxes, it appears, were collected, and repaid or recovered at the end of two years. So the defendants say that, but for the advice of the company, the other tax payers would probably have taken a course which would have resulted in a forfeiture of the whole tax by the company. But the tax payers did not make the company their adviser. There was no relation of trust or confidence. It was the right of every tax payer to tender his tax if he saw fit, and there being no special agreement on the part of the company to be performed, we think it would have been the duty of the treasurer to receive it, and if at the end of two years the company had not become entitled to it, it would have been repaid to the tax payer. In this way other tax payers besides those who paid might perhaps have gained by paying. But it is not for us to say that any tax not paid would have been forfeited if paid. The company, seeing the money in the treasury and a forfeiture imminent, might have done the amount of work requisite to save the forfeiture.

But it is said that the treasurer should not be compelled to act because the compliance by the company has not been
5. ____: ____: duly certified to him by the township trustees.
certificate.

The alleged defect consists in the fact that the certificates were not executed in accordance with any order of the trustees made at a meeting thereof. Section 392 of the Code provides that the trustees shall cause a record to be kept of all their proceedings. If the execution of the certificate is a proceeding of the trustees within the meaning of the statute, it appears to us that there should have been some action thereon at a trustees' meeting. But the statute merely provides, in regard to the certificate, that it shall be signed by the trustees or a majority of them. This is a clear intimation that its force is to be considered as originating in the

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signing. It is not the mere evidence of a previous order or resolution. Such are proved ordinarily by a certified copy, signed by the clerk. We think the certificates sufficient.

Another position taken by the defendants is that as there has been a judgment of forfeiture in regard to certain taxes paid, it should be considered a judgment of forfeiture in regard to the taxes not paid. But the judgment of forfeiture was based upon the fact that the taxes remained in the treasury two years without being earned by the company. This ground of forfeiture does not exist in regard to those not paid. Where taxes are actually paid into the treasury, so as to be available to the company immediately upon being earned, they become a source of strength to the company to enable it to earn them. If the company fails to earn them, it seems to be eminently proper, as the Legislature has provided, that after a suitable time (which is two years, in the judgment of the Legislature) they should be refunded. But those tax payers who, instead of paying, have had the use of their money, have not the same reason to complain of the company's delay.

It is finally insisted that the claim for the tax is not assignable. But the right of transfer is distinctly recognized in 6. —: —: chapter 48 of the Private and Local Acts of 1874. assignment. In our opinion the plaintiff is entitled to judgment in both actions. We think the resolution of the board of supervisors, declaring the tax abated, without authority and void. We think the tax became delinquent upon the publication of the notices, and that the plaintiff is entitled to a peremptory order of *mandamus* against the defendant Faris, as prayed for in the petition.

REVERSED.

SEEVERS, J., having been of counsel, took no part in this decision.

Kearney v. Ferguson.

KEARNEY V. FERGUSON.

1. **Practice in the Supreme Court: ABSTRACT.** The abstract should contain a copy of the bill of exceptions, duly certified as containing all the evidence, or it should state that it contains all the evidence; and if this is not denied by the appellee, and shown to be untrue by an amended abstract, it will be assumed to be true. If the appellee files an amended abstract, and that is not denied by the appellant, it will be assumed to be true.

50	72
81	81
81	81
50	72
82	71
82	71
50	72
97	598
98	651

Appeal from Buchanan Circuit Court.

MONDAY, DECEMBER 9.

ACTION for labor and for damages for breach of contract, whereby the defendant had agreed to employ the plaintiff to perform other labor. The plaintiff claims that he is entitled to recover the sum of two hundred and twenty-five dollars. There was a trial by jury, and verdict in favor of plaintiff, for fifty dollars. The plaintiff appeals.

E. E. Hasner, for appellant.

No appearance for appellee.

ADAMS, J.—The plaintiff contends that under the instructions of the court the verdict is unsupported by the evidence.

On this point a majority of the court are inclined to think that the verdict is not entirely without support. But, if it seemed to us otherwise, we should not be justified in reversing, because the abstract does not purport to contain all the evidence. It is true, what purports to be a copy of the judge's certificate to the bill of exceptions is set out, which shows that the bill of exceptions contains all the evidence. We infer, too, from the abstract, that a transcript has been filed. But, assuming that such is the fact, and that the transcript contains the bill of exceptions, the case is not so presented as to secure a review of the

1. PRACTICE in
the supreme
court: ab-
stract.

Toney v. Snyder.

findings of the jury upon the evidence. The abstract should purport to contain a copy of the bill of exceptions, duly certified as containing all the evidence; or, what would be better, the abstract should simply state that it contains all the evidence. If this is not denied by the appellee, and shown to be untrue by an amended abstract, it will be assumed to be true. If the appellee files an amended abstract, and that is not denied by appellant, it will be assumed to be true. The object of the rule is to obviate the labor and inconvenience of referring to the transcript, and to dispense as far as possible with the necessity of preparing and filing a transcript. The necessity for a transcript exists where a dispute arises as to what the record shows; but this seldom happens, and should happen less frequently than it does. The labors of this court are such as to require it to adhere strictly to the rule that cases must be presented fully in the abstract; but everything should of course be omitted therefrom not necessary to be examined in the determination of the questions involved. If the finding of the jury is to be reviewed, the abstract must be such as to justify the court in assuming that it contains all the evidence, although it may in fact contain but a portion of it. The abstract in this case being deficient, the judgment of the court below must be

AFFIRMED.

TONEY V. SNYDER.

1. **Party: WAGER.** A party acting for himself and others, in depositing with a stakeholder the amount of a wager, cannot recover in an action against the stakeholder more than the amount contributed by himself to the wager.

Appeal from Black Hawk Circuit Court.

MONDAY, DECEMBER 9.

ONE Peek made a wager with Wallace on the result of an election, and the money was placed in the hands of the

Toney v. Snyder.

defendant, as stakeholder. To recover the money deposited by Peek is the object of this action. Whatever rights the latter had belong to the plaintiff as his assignee.

There was a trial by the court, a finding of facts, and judgment for the plaintiff. The defendant appeals.

Hemenway, Polk & Thorp, for appellant.

No appearance for appellee.

SEEVERS, J.—The amount of money placed in the hands of the defendant by Peek was thirty dollars, but only five dollars belonged to him. The remaining twenty-five
1. PARTY: wa-
ger. dollars belonged to five other persons, they having contributed the same for the purpose of making the wager. The Circuit Court has given the certificate required by law, and has certified, under the rules, the following as presenting a question of law upon which it is desirable to have the opinion of this court: "Whether or not the party acting for himself and others, depositing the amount of a wager, can maintain in his own name an action against the stakeholder to recover back the money contributed and belonging to the parties for whom he acts, and whether or not he is limited in the amount of his recovery to the amount actually contributed by and belonging to him."

It is provided by statute that "every action must be prosecuted in the name of the real party in interest, except as provided in the next section." Code, § 2543.

Peek had no interest in the money contributed by others. He was not liable to them therefor. The wager, to the amount contributed by each person, was the separate wager of each. Peek was the agent of each in making the deposit, but this did not give him the right to sue for and recover the same from the stakeholder.

The next section (2544) of the Code provides that a "party with whom or in whose name a contract is made for the benefit of another," may bring a suit thereon in his own name.

The Centennial Mutual Life Ass'n v. Walker.

The difficulty under this section is that there was no contract. The whole transaction was absolutely void. We are, therefore, of the opinion the plaintiff cannot recover to any greater extent than the money belonging to Peek. This seems to have been the ruling in New York, in the absence of any statute requiring the action to be brought in the name of the real party in interest, *Ruckman v. Pitcher*, 20 N. Y. 9.

The defendant made a tender of the amount contributed by Peek, as we understand the abstract, and it is not, therefore, necessary to determine whether a demand was necessary or not.

REVERSED.

THE CENTENNIAL MUTUAL LIFE ASS'N V. WALKER ET AL.

1. **Corporations: SERVICE UPON AGENT: JURISDICTION.** In an action against a corporation service may be made upon any agent, general or special, charged with the business of the corporation in the county where suit is brought, if it arises out of or is connected with the business of the agency in that county.

50	75
86	613
50	75
107	412

Appeal from Dubuque Circuit Court.

MONDAY, DECEMBER 9.

THIS is an action to restrain by injunction the enforcement of a judgment recovered by the defendant Lance Walker against the plaintiff, on the 2d day of October, 1877, before one J. T. Jarrett, a justice of the peace for Julien township, Dubuque county. The petition alleges that notice of said action was served upon J. M. Hollis, as the agent of the defendant, and that the judgment is wholly void, for that "the said Hollis, upon whom such service was made, was not in the control of any office or agency of this plaintiff in the county of Dubuque, for the transaction of the business of this plaintiff at Dubuque, and at said time this plaintiff had no office or agency in the county of Dubuque for the transac-

The Centennial Mutual Life Ass'n v. Walker.

tion of any of its business; that the only person in the county of Dubuque, engaged in any business on behalf of this plaintiff, was one Charles Gilliam, who was a special agent for this plaintiff, in said county, for the soliciting of policies of insurance."

On the 9th day of November, 1877, a temporary injunction was issued, as prayed. January 7, 1878, the defendants answered, alleging that the said Hollis, upon whom said service was made, was one of the general agents of said plaintiff in the management and control of its business in the county of Dubuque, at the time said service was made, and denying that Charles Gilliam was the only agent of plaintiff in said county for the transaction of its business at the time said service was made. At the same time a motion to dissolve the injunction was filed. In support of the motion the defendant filed the following affidavit: "I, J. M. Hollis, * * say that on the 6th day of September, 1877, I was appointed by the Centennial Mutual Life Association its general manager of agencies, etc., a copy of which appointment is attached to this affidavit, marked exhibit 'A', and made part hereof; that on the 26th day of September, 1877, while acting as such general agent, I, as such agent, was served with notice issued from the office of J. T. Jarrett, J. P., in and for Julien township, Dubuque county, Iowa, in a suit wherein Lance Walker was plaintiff, and the Centennial Mutual Life Association was defendant, it being the same suit named in plaintiff's petition for an injunction, now pending in this court." The appointment referred to in this affidavit is as follows:

"To whom it may concern: The bearer, J. M. Hollis, has this day been appointed general manager of agencies for this association, with full power to take up and cancel all certificates of authority given by this association; to make new or alter old contracts, and do such other business as may be necessary from time to time, under the direction of the said association."

On the 9th day of January the plaintiff filed the following

The Centennial Mutual Life Ass'n v. Walker.

affidavit of J. M. Hollis: "J. M. Hollis * * * * says that, in making the affidavit in this cause on the 7th of January, 1878, he did not mean to be understood that he was an agent of said plaintiff, in charge of its agency at Dubuque, but that he was the general manager of agencies for said plaintiff in the State of Iowa, and that while at Dubuque he was served with the notice issued by Justice Jarrett; that the principal place of business of said company is and was at Burlington, Iowa, and that at the time said notice was served upon affiant one Charles Gilliam, a resident of the county of Dubuque, was the agent of said plaintiff in and for said county."

Upon this showing the court dissolved the injunction. Plaintiff appeals.

Fouke & Lyon, for appellant.

H. T. McNulty, for appellee.

DAY, J.—Section 2585 of the Code provides: "When a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located." The petition in this case alleges that one Charles Gilliam was a special agent for plaintiff in Dubuque county for the soliciting of policies of insurance. The affidavit of J. M. Hollis, filed on behalf of plaintiff, in substance states the same thing. By plaintiff's own showing it appears, therefore, that plaintiff had, at the time the action before the justice was instituted, an agency in the county of Dubuque for the soliciting of policies of insurance. Under section 2585 of the Code a suit growing out of or connected with the business of soliciting policies of insurance in Dubuque county may be brought in that county. The plaintiff does not allege in its petition that the suit in question could not be brought in Dubuque

1. CORPORATIONS: service upon agent: jurisdiction.

The Centennial Mutual Life Ass'n v. Walker.

county. Upon the contrary, it seems to be conceded that the venue of the action might properly be laid there. The position of appellant is that, the action being brought in Dubuque county, service of notice could not properly be made upon Hollis, the general agent, but should have been made upon Gilliam, the special or local agent. It must be borne in mind that section 2585 of the Code does no more than fix the county in which certain actions may be brought. It determines the jurisdiction over the subject-matter. It does not define the manner in which jurisdiction over the person is to be acquired. For this we must look to other provisions of the Code. Section 2612 of the Code provides: "When the action is against a municipal corporation, service may be made on the mayor or clerk, and if against any other corporation, on any trustee or officer thereof, or on any agent employed in general management of its business, or on any of the last known or acting officers of said corporation. * *"

Section 2613 is as follows: "When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

It will be observed that these sections provide two classes of agents on whom service may be made: *First*, service may be made on an agent employed in the general management of the business of the corporation. In this manner service may be made in all actions, without regard to the place where brought, for the section contains no restriction. *Second*, in actions growing out of or connected with the business of a particular office or agency, service may be made on an agent or clerk employed in such office or agency. It follows that in this case, conceding the action to arise out of or be connected with the special agency at Dubuque, which the petition does not controvert, service of notice might be made upon either the local or a general agent. The appointment of

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Hollis constitutes him a general agent. The injunction, we think, was properly dissolved. It is claimed that the court erred in dismissing plaintiff's petition. But the only relief sought, or which could properly be granted under the petition, was an injunction restraining the enforcement of the judgment. The plaintiff not being entitled to this, nothing remained to be tried. It is claimed in argument that the return on the original notice in the justice's court is fatally defective. Relief was not asked upon that ground in the court below. No such claim is made in the petition.

AFFIRMED.

FITZGERALD V. THE C., R. I. & P. R. Co.

LYNCH V. THE SAME.

50	79
493	767
50	79
4123	463

1. **Railroads: EJECTMENT OF PASSENGER: EXEMPLARY DAMAGES.** Where an employe of a railway company, in enforcing a valid rule of the company, in a case to which he in good faith believes it to apply, without wantonness, indignity or insult, ejects a passenger from a train, exemplary damages are not recoverable therefor.

Appeal from Muscatine Circuit Court.

MONDAY, DECEMBER 9.

THESE cases are presented on one abstract, under an agreement upon which they were tried together in the court below, and are to be presented in the same manner to this court. The plaintiffs seek to recover damages for injuries sustained in being ejected from a car of defendant after having purchased tickets to a station upon the railroad. There was a verdict in one case for two dollars and forty cents, and a judgment in each case for that amount under the agreement above mentioned. Plaintiffs appeal. The facts of the case appear in the opinion.

D. C. & Geo. R. Cloud, for appellants.

Richman & Carskadden, for appellee.

BECK, J.—The plaintiffs purchased tickets at Muscatine for Ononwa, a station a few miles distant, intending to take a freight train, then at the depot, which had a “caboose” for passengers. One of them placed his baggage upon the proper car, and the two crossed the street to a saloon and remained there until the train started, when they approached the train for the purpose of going upon the “caboose.” The conductor, by gestures, directed them not to get on, which they disregarded, and while the train was in motion went upon the platform of the “caboose.” They were ordered by the conductor to leave the car, and were informed if they did not obey force would be used. They testify that the conductor declared if they did not voluntarily get off the car he would “hurt them,” or one of them, to whom his words were addressed. They declined to leave the car while it was in motion, and it was thereupon stopped, and the plaintiffs left it. The conductor did not know, when he ordered plaintiffs off the car, that one of them had baggage in it. There was no violence used, and none threatened, except as above stated, and the conductor indulged in no insulting or abusive language.

A rule of the company, which was posted at the depot when plaintiffs purchased their tickets, required passengers to take freight trains at the depot, and forbidding conductors to permit passengers “to get upon the train after it has left the depot.” When plaintiffs went upon the car it was in motion, but had not passed the platform and depot buildings. The conductor, in obedience to this rule, forbade the plaintiffs to go upon the car, and in enforcing it required them, after they had disobeyed his orders, to leave the platform of the “caboose.”

The Circuit Court instructed the jury that the rule under

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which the conductor acted was reasonable, and the defendant had a right to establish it. We do not understand that counsel for plaintiffs question the correctness of this legal proposition. They excepted to the instruction in the court below, and base an assignment of error thereon in this court, but do not assail it in argument. The rule of the instruction is clearly correct, and as the objection thereto is waived by counsel failing to press it in argument it demands no discussion.

Another instruction directed the jury that if they found plaintiffs did not violate any rule of defendant in getting on the train they were entitled to recover the *actual* damages they sustained by reason of being compelled to leave the train, such damages being the value of the time lost by plaintiffs and the sum paid for the tickets purchased.

Still another instruction informed the jury that the evidence presented no sufficient ground for the recovery by plaintiffs of exemplary damages, or compensatory damages, for physical or mental suffering or injuries to the person.

Counsel for plaintiffs insist that these instructions are erroneous, in that they hold plaintiffs are not entitled to recover damages for the insult and indignity offered them, and for the wounded feelings, the "mental anguish"—using the expression of counsel—and that the law does not limit their right of recovery to actual damages.

Under the instructions of the court the jury found for plaintiffs, and assessed the actual damages sustained by them. It follows that the jury found plaintiffs were unlawfully ejected from the car. We are to inquire whether the Circuit Court erred in withdrawing from the jury the question of exemplary and compensatory damages for injured feelings. In a case quite similar we held that as a matter of law a plaintiff was not entitled to recover compensatory and exemplary damages, for the reason that no malice or wantonness was discoverable in the acts of the employe enforcing the rules of the railroad company. *Paine v. The C., R. I. & P. R. Co.*, 45

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Iowa, 569. The doctrine of that case is that if the conductor of a railroad train mistakingly enforces a valid rule of the corporation, and, without malice or wantonness, applies it in a case and to an individual where the rule is not applicable, honestly supposing he is in the discharge of his duty, there is no ground for allowing damages compensatory of indignity and insult. The cases before us come within that rule. It clearly appears that the conductor warned plaintiffs not to get upon the car. This was done in the enforcement of a valid rule of the corporation. We cannot doubt that he in good faith believed that the rule was applicable to the plaintiffs, and the circumstances required its application. He did no more than was necessary to enforce the rule. His threats of violently removing plaintiffs seem to have been necessary in order to enforce the rule. Indeed, he showed proper consideration for the safety and convenience of the plaintiffs in stopping his train at their request, and we cannot think that he could have enforced the rule with less exhibition of firmness and determination, or with more consideration for the convenience of plaintiffs. These cases are, in our opinion, within the rule of *Paine v. The C., R. I. & P. R. Co.*, *supra*.

Counsel object that the instruction in question excludes compensatory damages for injured feelings, which may be allowed when exemplary damages are not recoverable. But it will be observed that the question of compensatory damages for wantonness and oppression was in the case just cited, and it was held that in the absence of such conditions the plaintiff was not entitled to recover compensation for injured feelings.

In view of the facts that the conductor acted under a valid rule of the corporation, in a case where he honestly supposed it was applicable to plaintiffs, and enforced the rule with no more of sternness and vigor than was necessary to ensure obedience, without words of insult or violence, and that, under the circumstances of the case, no indignity was in truth inflicted upon plaintiffs, we think the court below did not err in excluding from the consideration of the jury, by the

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instructions and rulings upon the admission of evidence, the question of damages compensatory of the injured feelings, the "mental anguish," of plaintiffs.

AFFIRMED.

McDONALD & Co. v. NOONAN.

1. **Promissory Note: SIGNATURE: EVIDENCE.** The denial of the genuineness of a signature to a promissory note may be overcome by its similarity to an admitted signature and other circumstances.
2. ———: **EVIDENCE.** Evidence was competent to show that judgment had been rendered upon other notes, like the one in controversy, with the knowledge of defendant.

Appeal from Howard Circuit Court.

MONDAY, DECEMBER 9.

ACTION upon a promissory note. There was a verdict and judgment for plaintiffs. Defendant appeals. The facts of the case appear in the opinion.

H. Widner and H. C. McCartey, for appellant.

H. T. Reed, for appellees.

BECK, J.—The note in suit purports to be executed by defendant and three others. The defendant, in his answer, denied under oath the execution of the note.

I. The plaintiff, in support of the issue made by the answer, introduced the defendant, and his testimony was the
 1. **PROMISSORY note: signature: evidence.** only oral evidence in the case. He testified that he did not sign the note, but that he had agreed to sign a note or notes with the other parties, as their surety, to be given for a threshing machine; that he knew of the existence of this and other notes given for the machine, with his

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name purporting to be signed thereto, a few days after they were given, and made no objection thereto; that he was sued on one of the notes and made no defense; and that his signature to the affidavit attached to his answer in the case is genuine. Upon this evidence, and some other statements of like character, a verdict was rendered for plaintiffs, which defendant insists is so without support that we are required to set aside the judgment. We are not of that opinion. The defendant's absolute denial may have been overcome, in the minds of the jury, by absolute similarity of the signatures to the note and defendant's answer, his manner of testifying, and other matters of which we can have no cognizance. Other facts stated by him, some of which we have mentioned, would tend to discredit his denial of the signature, and support the case made by the comparison of signatures. We think the verdict is not so wanting in support of testimony as to justify our interference.

II. Defendant was required to testify, against his objections, that judgment was rendered on the other notes, and
2. ———: evi- that he went to the attorney holding the note to
dence. make inquiry about the suit, and had negotiations for a settlement of the claim. This evidence, it is insisted, was erroneously admitted. We think it was competent, in view of the fact that while knowing the existence of the notes and that he was sued on one of them, he failed to raise objections on the ground he did not sign them. This evidence would tend to discredit his denial of his signature.

III. The note provides for the payment by defendant of reasonable attorney's fees. The court, without evidence, allowed ten per cent on the judgment upon this contract in the note. Defendant now insists that the judgment is erroneous, because the attorney's fees were allowed without evidence. But the petition alleges that a sum equal to ten per cent of the amount claimed is a reasonable fee. This allegation was not denied in the answer; neither was any objection

Pennington v. Beedy.

made to the judgment on this ground in the court below. It cannot, under these circumstances, be made in this court.

No other questions arise in the case. The judgment of the court below is

AFFIRMED.

PENNINGTON V. BEEDY.

1. **Justice of the Peace: COSTS: FEES.** A justice of the peace cannot recover from the debtor his fees for the collection of a claim which he has collected without suit. Section 3804 of the Code applies to costs in an action and not to fees.

Appeal from Allamakee Circuit Court.

MONDAY, DECEMBER 9.

ACTION at law. There was a judgment for defendant upon demurrer to plaintiff's petition. Plaintiff appeals. The facts of the case are stated in the opinion.

W. B. Hendrick, for appellant.

Stilwell & Stewart, for appellee.

BECK, J.—The petition alleges that plaintiff is a justice of the peace, and received for collection a promissory note, signed by defendant, for eighty-five dollars. The plaintiff notified defendant that the note was in his hands for collection, and, at divers times, demanded payment. The defendant finally paid the amount due on the note, but refused to pay the costs, fees or percentage claimed by plaintiff to be due him under the statute for collection. To recover such fees or costs this action is brought. A demurrer to the petition was sustained.

To support this action plaintiff relies upon the provision of Code, § 3804, which is in these words:

 Greeley v. The Iowa State Insurance Co.

“Justices of the peace shall be entitled to charge and receive the following fees: * * * * *
 For all money collected and paid over without suit, five per cent, and for all money collected and paid over after suit brought without judgment, two per cent, which shall be added to the costs.”

There can be no *costs* except there be a suit. The two per cent allowed by this provision, by its express language, is to be taxed as costs of the suit. The provision for adding the per cent for collection to the costs, according to the grammatical construction of the whole sentence, must be understood as applicable to the case of money collected, after suit brought, without judgment. Neither can it be applied to the case of collection without suit, for the reason that there can be no costs when there is no suit.

Were the language of the statute less explicit, we would hesitate to enforce its provision against the debtor, who did not require the services, and hold that the law implied a contract on his part to pay for services required by another.

Regarding the compensation provided for by the statute as *fees*, not *costs*, they are recoverable from the party who demanded the services, under Code, § 3837.

The judgment of the Circuit Court is

AFFIRMED.

GREELEY V. THE IOWA STATE INSURANCE CO.

1. **Insurance: FAILURE TO PAY ASSESSMENT.** A policy of insurance provided that the insured should pay such sums as might be assessed by the directors of the company, and that upon failure to pay an assessment, after notice duly given, the directors might annul the policy. Notice of an assessment was mailed to plaintiff, who at that time was out of the country. Upon receipt of notice, however, plaintiff forwarded the amount, but the company refused to receive it, the policy having been previously annulled: *Held*, that upon the loss of the property by fire plaintiff could not recover.

Greeley v. The Iowa State Insurance Co.

Appeal from Chickasaw Circuit Court.

MONDAY, DECEMBER 9.

THIS is an action upon an insurance policy executed by the defendant to the plaintiff for the recovery of loss sustained by the burning of the insured property. The cause was tried by the court. Judgment was rendered for plaintiff for two thousand three hundred and six dollars and ninety-six cents. The defendant appeals.

Craig & Collier, for appellant.

Lawrence & Perrin and *L. L. Ainsworth*, for appellee.

DAY, J.—The defendant issued to plaintiff a policy of insurance, of which the material portion is as follows: “That,
 1. INSURANCE: failure to pay assessment. whereas, Helen R. Greeley, of Nashua, has become a member of Iowa State Insurance Company, and bound and obligated herself to pay all such sums of money as may be assessed by the directors thereof pursuant to the charter of said company, and also secured to said company the sum of three hundred and seventy-five dollars, being the amount of her deposit or premium for insuring the sum of twenty-five hundred dollars against loss or damage by fire or lightning, unto her, on the following property, * * * * during the term of six years commencing at noon on the 6th day of December, 1874, and ending at noon on the same day of the month, 1880: Now, be it known that we, members of the said company, for and in consideration of the premises, do hereby certify that the said Helen R. Greeley is insured in and by the company aforesaid, upon the property aforesaid, in the sum of twenty-five hundred dollars, and we do, therefore, promise, according to the provisions of said charter, to pay the said sum insured within three months next after the said loss shall have been proven. * * * *

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The conditions of insurance, the charter and by-laws annexed, and application, form a part of this policy."

The articles of incorporation are indorsed upon the policy, and the following are the provisions material to this controversy:

"Section 6. The amount and rates of insurance shall be, from time to time, fixed and regulated by the board of directors, and premium notes thereof may be received from the insured, which shall be paid at such time or times, and in such sum or sums, as the company shall from time to time require for the payment of expenses and losses.

"Section 15. The directors shall, after receiving notice of any loss or damage by fire sustained by any member or other person insured, and ascertaining the same, or after the rendition of any judgment as aforesaid against said company for loss or damage, settle or determine the sums to be paid by the several members thereof, as their respective proportion of such loss, and notify them in such manner as they shall see fit, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of his, her or their premium note, and shall be paid to the treasurer within thirty days after such notice; and if any member shall, for thirty days after such notice, neglect or refuse to pay the sum assessed to him, her or them, as aforesaid, the directors may sue for and recover the whole amount of said premium note or notes, and at their option annul the policy of insurance, and the money thus collected shall remain in the treasury of said company, subject to the payment of such losses and expenses as have or may thereafter accrue, and the balance, if any remain, shall be returned to the party from whom it was collected, on demand, after thirty days from the expiration of the term for which such insurance was made."

On the 1st of September, 1876, the board of directors of defendant resolved that, for the purpose of paying losses and expenses of the company for the year ending at that date, an

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assessment of twelve per cent be ordered on premium notes dated prior to September 1, 1875, and of ten per cent on all premium notes dated since September 1, 1875, and that the assessment thus ordered be made payable on or before the 10th day of October, 1876, at 12 o'clock m., at the office of the company in Keokuk. A notice, dated at Keokuk, September 1, 1876, signed by Howard Tucker, and addressed to Mrs. Helen R. Greeley, was sent by mail to plaintiff at Nashua, her place of residence, sometime from the 1st to the 3d of September, and in due course of mail should have reached there in two days. The notice is as follows: "You are hereby notified that, for the purpose of paying losses and expenses of the company for the year ending this date, an assessment of twelve per cent on all policies issued prior to September 1, 1875, has this day been ordered by the board of directors of this company, payable on or before the 10th day of October, 1876, at the office of the company in the city of Keokuk, Lee county, Iowa. Amount due on premium note, No. 8134, is forty-five dollars. Remit by draft, post-office order, or express, without expense to the company. The number of your policy is 8134, which you must not fail to mention when [you] remit the amount of your assessment."

On the 10th day of October, 1876, the plaintiff having made default in the payment of her assessment, the board of directors adopted the following resolution:

"That upon all policies on which the assessment of the 1st day of September, 1876, remaining due at this date, to-wit: October 10, 1876, the party so in default shall be excluded and debarred, and shall lose all benefit and advantage of his, her or their insurance or insurances, respectively, for and during the term of such default or non-payment, and notwithstanding shall be liable and obliged to pay all assessments that shall be made during the continuance of his, her or their policies of insurance, in accordance with the articles of incorporation."

On the 6th or 7th of August, 1876, the plaintiff, accom-

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panied by her husband, who acted as her general business agent, left their home in Nashua to attend the centennial exposition at Philadelphia. They remained at Philadelphia until the 15th or 20th of August, went thence to Nashua, New Hampshire, and Boston, and sailed thence to Liverpool, England. The plaintiff's husband constituted F. R. Shope his agent, at Nashua, Iowa, directed him to open all mail received after the 20th of August, to pay taxes and this insurance, and to transact all business that came by mail, or otherwise, to himself or plaintiff. Shope directed the postmaster to put in his box letters directed to plaintiff or her husband.

The notice of assessment issued by defendant was not received at Nashua by Shope, but was forwarded to plaintiff, and received in London on the 1st day of October, 1876. On the 6th of October, 1876, the plaintiff's husband sent from London to A. G. Case, of Charles City, a check for forty-five dollars, and directed him to send the money to Howard Tucker, secretary of the Iowa State Insurance Company. On the 13th day of October the property insured was destroyed by fire. On the 22d or 23d of October Case received the check, and on the 24th he sent defendant, by draft, forty-five dollars. On the 26th the draft was returned, with the statement that on the 10th of October the policy was annulled for non-payment of assessment, and the money could not be received after the insured property had been destroyed.

From the facts disclosed we think the plaintiff cannot recover. The articles of incorporation, indorsed upon and made part of the policy, provide that the directors shall determine the sums to be paid by the several members of the company to adjust losses sustained or expenses incurred, and notify them in such manner as they shall see fit, or as the by-laws prescribe. Section 2, article 2 of the by-laws provides: "Whenever any assessment shall have been declared by the company, and notice thereof forwarded to the insured, by mail or otherwise, and the insured shall, for the space of thirty days after such notice, refuse or neglect to pay the same,

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the directors may sue for and recover the whole amount of said premium note or notes, and at their option annul the policy of insurance."

Notice of the assessment was given by mail, as this by-law provides, as early as the 3d day of September, and, in contemplation of law, the plaintiff had notice when in the ordinary course of mail the notice should have reached Nashua. It would greatly embarrass the defendant, if not render the transaction of its business impracticable, if it should be required to prove actual delivery of notice to the party assessed. Besides, the by-laws are made a part of the policy, and become a part of the contract entered into between the parties. By express stipulation it is agreed that the policy may be forfeited for refusal or neglect to pay an assessment within thirty days after notice thereof forwarded to the insured by mail. The company did all it was required to do. That the notice was not received by plaintiff was her misfortune and not the defendant's fault. By this failure the defendant was prevented from receiving the assessment upon the premium note, and, under the policy, the charter and the by-laws, acquired the right to debar the plaintiff, as it did, of all benefit and advantage under the insurance during the period of default. *Coles v. Iowa State Mutual Insurance Company*, 18 Iowa, 425. See *Lathrop v. Greenfield Stock & Mutual Fire Insurance Company*, 2 Allen, 82. Appellee urges that plaintiff did not refuse to pay, and, as she was not negligent in the premises, she did not neglect to pay. We are satisfied, however, that to fail to pay is to neglect to pay.

The judgment is

REVERSED.

 Connolly v. Dillrance.

CONNOLLY v. DILLRANCE.

1. **Vendor and Vendee: FRAUD.** The sale of personal property by an insolvent person for its full value, for cash and a pre-existing debt, does not of itself imply fraud in the transaction.
2. ———: ———: **LIEN.** Fraud will not be imputed to the purchase by the senior lien holder of articles covered by a junior lien, notwithstanding the senior lien embraced other articles not subject to the junior lien.

Appeal from Dubuque District Court.

MONDAY, DECEMBER 9.

THE plaintiff claims that the garnishee had property in his hands belonging to the debtor Farrar. The court so found, and rendered judgment for the value. Other facts are stated in the opinion. The garnishee appeals.

Graham & Cady, for appellant.

E. McCeney and John Deery, for appellee.

ADAMS, J.—The garnishee, at the time he was garnished, had in his possession a horse and wagon which he claimed that he purchased of the debtor Farrar. In his answer he set up the purchase. The plaintiff took issue, averring that the purchase was made to defraud the plaintiff, and, therefore, void. He averred some other matters, which will be referred to hereafter. After the garnishee had answered he sold the horse and wagon for one hundred and five dollars, which appeared to be the fair value of the property, and the court charged him as garnishee with that amount.

The first question to be determined is whether there is any evidence that the sale to the garnishee was fraudulent. It is undisputed that the garnishee held an unsecured note against

 Connolly v. Dillrance.

Farrar for seventy-two dollars, and that he gave for the horse and wagon the note and twenty-five dollars in cash. It is also undisputed that Farrar was insolvent; that the plaintiff had a claim against him of about one hundred and thirty-five dollars; that the garnishee was informed by plaintiff that he had such claim, and that the garnishee immediately made the purchase in question. It is not shown that the garnishee knew that Farrar was insolvent, or that the plaintiff was about to bring an action to enforce his claim. If there was evidence of fraud, it is to be gathered from the foregoing facts. Fraud may, of course, be inferred from circumstances; but it is not to be inferred from very slight circumstances, which are entirely consistent with honesty. The circumstance relied upon in this case is that the garnishee purchased the property of Farrar, knowing that Farrar owed the plaintiff one hundred and thirty-five dollars. But, certainly, persons who are in debt must be allowed to sell property as well as others. Persons even who are insolvent must be allowed to sell property. It is their duty, by sales, to meet their obligations as far as possible. If they sell for full value for cash, or for cash and a pre-existing indebtedness, there is nothing in such transaction alone to indicate fraud.

There is another branch, however, to this case, and it is upon this that the plaintiff seems mainly to rely. The plaintiff avers in his pleadings, and the conceded fact is, ^{2. —: —: lien.} that at the time the garnishee bought the property in question he was holding a chattel mortgage which covered the property, and also a buggy and a sleigh, the mortgage having been given to secure a note of one hundred dollars; that the plaintiff had a subsequent lien upon the buggy and sleigh alone, and that afterward the garnishee foreclosed his mortgage upon the buggy and sleigh, and exhausted them without fully paying his debt, thereby depriving the plaintiff of all advantage from his subsequent lien.

The plaintiff's theory seems to be that the garnishee could

Connolly v. Dillrance.

not make a valid purchase of the horse and wagon, so as to cast the entire burden of his mortgage upon the buggy and sleigh, upon which alone the plaintiff's security rested. But we know of no rule of law which makes such a purchase void. It was Farrar's right to sell the horse and wagon subject to the mortgage, with the mortgagee's consent, to any person he pleased. Whether in such case the property after the sale would have been held to bear the burden of the mortgage as the primary fund, or to bear merely a proportionate share according to value, the sale would be valid in either case. So where, as in this case, the purchaser of the part not covered by the junior lien is the holder of the senior lien, the sale is not invalid. The most that the junior lien holder could claim would be that the mortgage constituting the senior lien should, notwithstanding the sale, be enforced primarily against that property. If a proper proceeding in equity had been commenced, before the sale, by the junior lien holder, to cast the burden of the senior lien primarily upon the property not covered by the junior lien, the proceeding, we think, could not be defeated by a subsequent sale. Whether such proceeding would be effectual if not commenced before the sale, we need not determine. Such relief is not sought. The plaintiff must be regarded as predicating his claim to hold the garnishee for the horse and wagon upon the theory that the title did not pass. We think it did pass.

REVERSED.

Templin v. Henkle.

TEMPLIN V. HENKLE.

1. **Attorney: FEES: PLEADING.** Where an attorney claimed a certain amount for services, and the defendant admitted the services were rendered, but said they were rendered under a special contract, and denied they were of the value claimed, *held*, that the defendant's admission did not entitle the plaintiff to judgment for the amount claimed.

Appeal from Iowa District Court.

MONDAY, DECEMBER 9.

ACTION to recover for legal services performed and money advanced by the plaintiff for the defendant in a case wherein the defendant was a party. The defendant, in his answer, admits that the services were rendered, but says that they were rendered under a special contract, and that the plaintiff has been fully paid. The case having been referred, the referee reported that the plaintiff had received from the defendant one hundred and twenty dollars and fifty cents; that he had expended for the defendant fifty dollars and seventy-five cents, leaving sixty-nine dollars and seventy-five cents as fees, which were reasonable fees for the services rendered. The report was confirmed, and judgment entered accordingly for the defendant. Plaintiff appeals.

J. A. Smith, for appellant.

Rumple & Lake, for appellee.

ADAMS, J.—I. The plaintiff claims that, as the referee did not find a special contract, he was entitled, under the admission of the answer, to recover the whole amount claimed
1. **ATTORNEY:**
fees: pleading. for services, to-wit: three hundred dollars. The defendant's admission is that the "plaintiff rendered him the services," but he denies that they were of the value claimed, and the referee so found. We see nothing in the answer inconsistent with the finding.

Holwig v. Rowler.

II. The plaintiff claims that he is charged by the referee with twenty-five dollars paid by defendant to associate counsel. But we do not so understand. The referee finds that the aggregate attorney's fees paid by defendant in the case were ninety-four dollars and seventy-five cents; that of the amount twenty-five dollars was paid by defendant to counsel associated with the plaintiff, and sixty-nine dollars and seventy-five cents to the plaintiff, and that the latter sum was all the plaintiff's services were worth.

III. The plaintiff complains that he is improperly charged with forty-eight dollars and fifty cents, being Supreme Court costs collected and retained by him. He says he should not be charged with this money, because in collecting the money he collected merely what he had previously advanced. He had, however, been previously credited with it by the referee as money advanced, and it follows of course that he should be charged with the same money as collected. The plaintiff could not properly be allowed the money and credit too.

IV. The plaintiff complains that the finding is not supported by the evidence, but the abstract does not purport to contain all the evidence.

AFFIRMED.

HOLWIG V. ROWLER ET AL.

1. **Practice in the Supreme Court: ABSTRACT.** Errors will not be presumed, and the record and abstract must conclusively show them. When error is predicated upon the evidence, it must be sufficiently set out in the abstract.

Appeal from Howard District Court.

MONDAY, DECEMBER 9.

An injunction was allowed upon a petition filed in the Howard District Court. A motion to dissolve the injunction, which

 Holwig v. Rowler.

was brought before the judge of the District Court at chambers, was overruled. From this decision defendants appeal.

W. K. Barker, for appellants.

H. T. Reed, for appellee.

BECK, J.—There is really no question presented in this case for our decision. From the abstract and amended abstract filed by appellee, which are not questioned by the appellants, it appears that a motion to dissolve the injunction was presented, and overruled by the judge of the District Court at chambers. The motion was based upon eleven distinct grounds, each involving a separate fact. But the difficulty is that the abstracts fail to show a single one of these facts. The judge does not certify to the evidence submitted to him. He signed a “*skeleton*” bill of exceptions, but there is nothing in the record to show the evidence intended to be included in the bill of exceptions when it should be filled up.

The evidence as set out in defendants’ abstract consists of a stipulation of facts, and a list of certain documents and records, without an attempt to state the contents, or to set them out in full or in part. But, if we could get any light from this evidence, the difficulty confronts us that it is not shown a particle of it was submitted to the judge deciding the motion. Defendants’ abstract even fails to show that the agreed statement of facts was submitted to the judge. It may be construed to show that the documents and records were considered by him, but it fails to show their purport or substance.

The point is made that the injunction was issued by the clerk of the District Court, while the order therefor by the judge was directed to the clerk of the Circuit Court. But, surprising to say, the abstract fails to show which clerk issued the writ. It shows that an order was made as alleged, but

The Ind. Dist. of Mason City v. Reichard.

does not show the writ was issued upon it, or that no other order was made to the clerk of the District Court.

The abstracts and records before us must show errors; we will not presume their existence or imagine facts in order to find them. All presumptions must be exercised to support the decision of the court below.

The record and abstract must show, when a point is made upon the evidence, what evidence was introduced, which must be sufficiently set out.

An amended abstract filed by the appellee, unless denied or called in question, will be taken as correct.

Attention to these familiar rules would have avoided the difficulties in this case, and secured its consideration upon the merits.

The decision of the judge of the District Court overruling the motion to dissolve the injunction must be

AFFIRMED.

THE IND. DIST. OF MASON CITY V. REICHARD ET AL.

1. **Surety : CHANGE OF CONTRACT : RELEASE.** The surety has the right to stand upon the terms of the original contract, and any material change therein without his consent, affecting the subject-matter of the contract even to a slight degree, will exonerate him.
2. **—— : CONTRACT : SIGNATURE IN OFFICIAL CAPACITY.** Where a party signs a contract in his official capacity he is not liable individually, and an action may be maintained thereon against a surety in the name of the party or corporation he represented.
3. **—— : SCHOOL DISTRICT.** While a school district, in whose favor a bond to secure a contract had been executed, might not have power directly to release the sureties, it had authority to change the contract, and the effect of the change would be the release of the sureties.

Appeal from Marion District Court.

MONDAY, DECEMBER 9.

THIS is an action to recover damages on a bond given by defendants to secure the performance by the defendant Jacob

50	98
106	599
50	98
117	321

The Ind. Dist. of Mason City v. Reichard.

Reichard of a contract entered into by him with the plaintiff for the erection of a school-house. Jacob Reichard was the principal, and John Reichard, Joseph Johnson and A. D. Wetherell were the sureties upon this bond, which was executed on the 29th day of April, 1872. The original contract was executed on the same day, and stipulated for the building of the school-house of brick, and the completion of it by the 15th day of November, 1872, for the consideration of twenty-one thousand dollars, to be paid as follows: "Twenty thousand dollars in bonds of said school district at par, to be delivered to said second party upon his executing and delivering to said first party a good and sufficient bond, with sureties, conditioned that said second party shall build and finish said school-house according to the terms, drafts, plans and specifications of this contract; said bond and sureties to be approved by the school board of said school district, and one thousand dollars in money upon the completion of said school-house, and its acceptance by said school board."

The petition alleges that on the 16th day of July, 1872, the plaintiff and the said Jacob Reichard entered into a written contract making a change in the terms of the original contract for the building and completion of the school-house, and that subsequently thereto, on the 12th of August, 1872, the other defendants, by their contract in writing, assented to said changes. The action is brought for a failure to complete the school-house by the 1st day of January, 1873, the time fixed in the contract as changed. The defendants, sureties on the bond, answered, admitting that changes were made on July 16, 1872, in the terms of the original contract for the building and completion of the school-house, but denying that on the 12th day of August, or at any other time, they assented thereto. These defendants further allege in their answer that the original contract between plaintiff and Reichard was changed materially, without the consent of said sureties, on the 11th day of May, 1872; that by the terms of said last mentioned contract the original contract was so

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changed that plaintiff was required to negotiate the bonds mentioned in said original contract at an expense of not less than one thousand dollars, to be paid by said Reichard; and said original contract was still further altered in regard to the mode and time of payment of the contract price for the erection of said school-house, so as to be paid as follows: Twelve thousand dollars within twenty days from the date of said new or supplemental contract; six thousand dollars when the walls of the building were completed and ready for the joists; one thousand dollars when said building should be built and accepted by plaintiff. The defendants insist that, on account of these changes made, as alleged, without their consent, they are discharged from liability as sureties upon the bond. The cause was tried by a jury, and under the instructions of the court a verdict was returned against the defendant Jacob Reichard for eleven thousand dollars, and in favor of the other defendants. The plaintiff appeals.

B. F. Hartshorn, Miller & Cliggitt and J. G. Patterson, for appellant.

M. E. Cutts and Stone & Ayres, for appellees.

DAY, J.—The original contract was entered into on the 29th day of April, 1872, and provides for the delivery to
1. SURETY: Jacob Reichard, in payment for the work stipu-
change of con-
tract: release. lated to be performed by him, of twenty thousand dollars in bonds of the school district at par, upon his executing and delivering a bond conditioned for the building of the school-house according to plans and specifications referred to. The bond was executed upon the same day, and for the conditions to be performed by Jacob Reichard refers to this agreement.

On the 11th day of May, 1872, the following agreement was entered into:

“It is hereby further agreed between the school board and said Reichard that the school board shall negotiate said bonds

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for said Reichard at an expense of not more than one thousand dollars, which expense shall be paid by said Reichard, and the board shall make payment as follows to said Reichard: Twelve thousand dollars within twenty days from this date; six thousand dollars when the walls of said building are completed and ready for the joists, and one thousand dollars when the building is completed and accepted by the board."

This contract was signed by Jacob Reichard and by the board of directors of plaintiff, and attested by their secretary. There is no proof that the sureties upon the bond assented to this contract, and it is not claimed that they ever did assent thereto. The changes made by this agreement are material. By the original contract defendant Jacob Reichard was to have twenty thousand dollars in bonds as soon as he gave bond, with sureties, for the proper performance of his contract. Under this supplemental agreement no payment was to be made until twenty days after the agreement was signed, and then only twelve thousand dollars was to be paid. Of the balance, the payment of six thousand dollars was to be postponed until the walls of the building were completed and ready for the joists; one thousand dollars was not to be paid until the building was accepted; and the remaining one thousand dollars was to be allowed to the school board for negotiating the bonds. We think it is very clear that these changes operated to discharge the sureties upon the bond.

"Any alteration, however *bona fide*, by the creditor and the principal, without the assent of the surety, of the terms of the original agreement, so far as they relate to the subject-matter in respect of which the surety became responsible for the principal, will exonerate the surety." Chitty on Contracts (11th Ed.), 776. "And this doctrine seems to hold, although the new terms thus substituted vary only in a slight degree from those of the original agreement." Id., 777. In regard to this principle, in *Miller v. Stewart*, 9 Wheat., 680, it is said: "It is not sufficient that he" (a surety) "may sustain no injury by a change in the contract, or that it may even be for his benefit.

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He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." See, also, *Grant v. Smith*, 46 N. Y., 93; *Cunningham v. Wren*, 23 Ill., 69; *Rowan v. Sharp & Co.*, 33 Conn., 1.

II. Appellant claims that the contract of May 11, 1872, was entered into between Jacob Reichard and the directors of plaintiff as individuals, and not between Jacob Reichard and plaintiff. This position, we think, is not tenable. The agreement is signed by all the directors in an official capacity, and attested by their secretary. It does not bind the directors as individuals, and is binding upon the district. See *Baker v. Chables*, 4 G. Greene, 428; *Lyon v. Adamson et al.*, 7 Iowa, 509.

III. It is claimed that the school district had no authority to release the sureties from liability upon their bond. It cannot, however, be denied that the school district had authority to change its original contract with Reichard. When such change is made the legal consequences are the same as if the change were made between individuals.

IV. It is further urged that the board had carried out its contract with Reichard by a delivery to him of the bonds as agreed before the contract of May 11, 1872, was entered into, and that Reichard, having the bonds pursuant to the original contract, might make any agreement respecting them he saw fit, without discharging the sureties. The evidence does not sustain this position. The only testimony upon the subject is that of A. B. Tuttle, a member of the board, who says: "The bonds were made out and signed, but whether they were then delivered to him I can't say. Some of them, I think, were delivered. The question came up before the board, and Reichard, as he stated the matter, could not negotiate the bonds very well, and Lytle, one of the members of the board, knew where they could be negotiated, and the bonds were

The Ind. Dist. of Mason City v. Reichard.

returned to the board, and the board acted as his agent in negotiating the bonds." The most that can be claimed for this evidence is that it establishes that some of the bonds were delivered. But Reichard, under his contract, was entitled to all of them. Even if appellant's position on this branch of the case be correct, yet a change in the contract which prevented Reichard from receiving some of the bonds would be material, and would discharge the sureties.

A further change in the contract was made July 16, 1872, changing the time for the completion of the building to January 1, 1873. The plaintiff claims that the sureties assented to this change. The sureties deny that they so assented. This question involves a construction of writing executed by the sureties on the 12th of August, 1872.

As the changes above considered operated to discharge the sureties from liability, we deem it unnecessary to consider the effect of the subsequent contract of July 16th, or of the instrument executed by the sureties, August 12th. The view above presented disposes of the material and vital questions in the case, without an effort to consider in detail the many errors assigned. It is our opinion that the plaintiff cannot recover against the sureties.

AFFIRMED.

SEEVERS, J., having been of counsel, took no part in the decision of this case.

Wise v. Adair.

WISE V. ADAIR.

1. **Evidence: PAROL TO EXPLAIN WRITING.** Parol testimony is admissible to show that a letter admitting an indebtedness was addressed to the plaintiff and referred to the account in controversy, but not to establish the amount.
2. ———: **ADMISSION.** An admission of an indebtedness may be implied in an inquiry.

Appeal from Jasper District Court.

MONDAY, DECEMBER 9.

ACTION upon an account for eight hundred and thirty-two dollars and fifty-two cents, which account accrued more than five years prior to the commencement of the action. The plaintiff, however, alleges that the same was taken out of the statute of limitations by the written admission of the defendant that the debt was unpaid. The answer was a general denial. There was a trial without a jury. Judgment for plaintiff. Defendant appeals.

Ryan Bros., for appellant.

Smith & Wilson, for appellee.

ADAMS, J.—The writing upon which the plaintiff relies purports to be a letter, and is in the following words: "DEAR
1. EVIDENCE: SISTER: How will it suit you to make three notes
parol to ex-plain writing. of the amount due you, as you say you intend it
for the children? Say make one due this fall (October 15), and
the next due in one year after that, and in twelve months after
that the third one due, bearing interest say from January 1,
1877. Say for the oldest, two hundred and fifteen dollars,
October 15, 1877; for the next, two hundred and thirty-five
dollars, October 15, 1878; and for the youngest, two hundred
and fifty-five dollars, October 15, 1879." The plaintiff intro-

50	104
81	104
50	104
92	358
50	104
93	672
50	104
127	464

Wise v. Adair.

duced the letter in evidence, and also introduced as a witness one J. W. Wilson, who testified that the defendant admitted to him that he wrote the letter to the plaintiff; that the letter was written in reference to the account sued on, and that the account was correct. The defendant objected to the testimony of Wilson as incompetent. The court overruled the objection and the defendant excepted.

The testimony was admissible, we think, so far as it was offered to prove that the letter was addressed to the plaintiff and referred to the account in suit. *Penley v. Waterhouse*, 3 Iowa, 418. It was not, we think, admissible to prove what was due. Proof of that must rest upon the letter alone. If the plaintiff had admitted in the letter that a certain account was due, proof of what account was referred to would have been all that would have been necessary to justify a recovery upon the whole account. We should not, in such case, extend the plaintiff's liability beyond what he admitted it in writing. But the defendant admitted (if the letter can be called an admission) somewhat less than the amount of the account. In admitting parol evidence that there was more unpaid than the defendant admitted, and in rendering judgment therefor, we think that the court erred.

It is insisted, also, that the court erred in admitting the letter in evidence. It is said that it does not contain an admission, but a mere inquiry. If the issue had not been as to the statute of limitations, but as to whether the account had been paid or not, it seems to us that the letter would have been admissible in evidence to prove that the amount mentioned therein had not been paid. The inquiry is: "How would it suit to make three notes of *the amount due you?*" It is equivalent to asking: "How would it suit to make three notes of the amount which is due you?" The interrogation involves, we think, an admission. Of course if no amount had been specified in the writing, no action could have been predicated upon it. As it is, the plaintiff appears to be entitled to recover seven hundred and five dol-

2. ____: ad-
mission.

Jones and Atkinson v. Leonard.

lars, and interest thereon at six per cent from January 1, 1877. As the plaintiff offers to remit if the judgment below is found to be too large, the case will not be reversed, but judgment may be taken for the amount as above provided, and the plaintiff must pay the costs of the appeal.

MODIFIED AND AFFIRMED.

JONES AND ATKINSON V. LEONARD.

1. **Extradition: REQUISITION: EVIDENCE.** The determination of the Governor that the sworn evidence accompanying a requisition is sufficient to establish the facts upon which the requisition is based, is not conclusive of the matters therein set forth.
2. ———: ———: **WHO IS A FUGITIVE.** A citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another State upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the constitution.

Appeal from an Order made by Hon. D. C. Richman, Judge of the Circuit Court of Scott County.

TUESDAY, DECEMBER 10.

THE plaintiffs were indicted, in the State of Massachusetts, for the crime of "cheating, by false pretenses, with intent to defraud." On the requisition of the Governor of said State the Governor of Iowa issued a warrant for the arrest of plaintiffs, and their delivery to an agent appointed by the Governor of Massachusetts, for the purpose of taking them to the last named State. The defendant, as sheriff, made the arrest, and, while in his custody, the plaintiffs applied for and obtained a writ of *habeas corpus*.

At the hearing the plaintiffs were discharged from custody, and the defendant appeals.

Jones and Atkinson v. Leonard.

Davison & Lane, for appellant.

Rose & Linsley, Bills & Block and Cook & Richman, for appellees.

✓ **SEEVERS, J.**—The learned judge of the Circuit Court discharged the plaintiffs from custody, as we infer, on two grounds: *First*, that the plaintiffs were not in fact fugitives from justice, for the reason that they had never fled; and, *second*, the evidence accompanying the requisition failed to show they were such; and appellees mainly, if not entirely, rely thereon for an affirmance. It is not claimed the plaintiffs were ever even temporarily residents of the State of Massachusetts. At the time the alleged crime was committed they were citizens of and residents of this State.

The false pretense was contained in a letter written by them in this State to certain persons in Boston, in which it was stated they owned a large amount of property over and above their indebtedness, by means of which they obtained on credit certain merchandise.

The Constitution of the United States provides that “a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.”

It is provided by a statute of this State that the requisition of the Governor of another State “shall be accompanied by sworn evidence that the party charged is a fugitive from justice.” Code, § 4174.

The sworn evidence accompanying the requisition consisted of an affidavit in which it was stated the plaintiffs “are fugitives from justice.” There are grave doubts whether such a statement constitutes the evidence required by the statute. Whether the plaintiffs were such fugitives is a mixed question

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of law and fact. The latter being stated or ascertained, a legal conclusion would follow or be based thereon. Instead of stating facts, the affidavit states nothing more than the legal conclusion of the person making the affidavit. The statute requires the Governor to determine whether or not the person or persons are fugitives from justice. Sworn evidence is to be submitted to him to enable him to do so. Such evidence may be in the form of affidavits. But instead of any facts being stated, upon which an independent judgment could be formed, the Governor must have relied wholly on the legal conclusion of another.

It seems to us that to sanction such a proceeding would be establishing a dangerous precedent. By issuing his warrant for the arrest of the plaintiffs it may be said the Governor has determined this question. But this does not conclude all inquiry by the courts as to the sufficiency of the evidence upon which his conclusion was based. It may be conceded that the affidavit was *prima facie* sufficient, or rather it was the province of the Governor to so determine. But this we do not think is conclusive upon this or any other question connected with the extradition of the citizen. This point will be further noticed hereafter. Conceding, however, that the determination of the Governor is conclusive as to the sufficiency of the affidavit, we have for determination the question whether the plaintiffs are in fact fugitives from justice.

Bouvier defines such a person to be "one who, having committed a crime in one jurisdiction, goes into another in order
2. _____: _____: to evade the law and avoid punishment" (1 Bou-
fugitive. vier's Law Dictionary, 551); and the Constitution of the United States defines such person to be one "who shall flee from justice."

It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the Constitution of the United States. The words "who shall flee" do not include a person who never was in the country from which he is said to have fled.

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It is urged, however, that the plaintiffs were constructively in Massachusetts at the time the crime is alleged to have been committed, and that they have constructively fled therefrom.

In *The People v. Adams*, 3 Denio, 190, it was held that a person actually a resident of Ohio could commit a crime in New York, and upon his coming voluntarily into the last named State he could be there tried and convicted. We are not required to either approve or disapprove the doctrine laid down in this case, and it will be presumed the laws of Massachusetts are the same as those of New York in this respect. In the cited case the defendant went voluntarily into the State of New York, and it might with much propriety be said that, having so done, he was amenable to the laws thereof.

The question in the case at bar is very different. Granting that a crime may be thus committed, the question before us is whether, then, the State of Iowa is bound to surrender a citizen to the State in which the crime was committed? This depends upon the obligation in this respect imposed by the Constitution of the United States. Before it can be said there is such an obligation, two things must appear. There must be—*First*, a crime charged; and, *second*, that the person charged is a fugitive from justice; that is to say, "that he has fled from the State in which he is charged with the crime to escape punishment." Such must be the legal effect of his fleeing. In other words, he must have been in the State, committed the crime, and fled.

The Constitution of the United States does not require Iowa to surrender, on the demand of a sister State, as a fugitive from justice, one who only constructively has fled from the latter. Hurd on Habeas Corpus (2d Ed.), 612.

If the decision of the Governor is final and conclusive as to this question, it must be so as to all questions touching the extradition of a citizen under the constitutional provision above quoted. Counsel for the appellant concede there are

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cases in which a writ of *habeas corpus* may issue, and the prisoner be discharged. In fact, the power of the courts at this day cannot be seriously questioned. Hurd on Habeas Corpus (2d Ed.), 621; *In the matter of Manchester*, 5 Cal., 237; *Ex parte Smith*, 3 McLean, 121.

The Governor of this State is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this State which provides that his determination is final and conclusive in the case of the extradition of the citizen.

In the absence of such a provision we hold that the decision of the Governor only makes a *prima facie* case; that it is competent for the courts, in a proceeding of this character, to inquire into the correctness of his decision, and discharge the prisoner.

AFFIRMED.

SIMONDSON V. SIMONDSON.

1. **Practice :** CHANGE OF STATUTE: TRIAL DE NOVO. Chapter 145, Laws of 1878, relating to the trial of equitable actions, applies only to cases tried in the court below since the statute took effect.

Appeal from Winneshiek District Court.

TUESDAY, DECEMBER 10.

ACTION in chancery for divorce. There was a decree dismissing plaintiff's petition, from which she appeals. The facts upon which the points ruled in the case are based will be found in the opinion.

Willett & Willett, for appellant.

M. N. Johnson & Bro., for appellee.

 Simondson v. Simondson.

BECK, J.—The action was tried and the decree rendered on the 29th day of March, 1878, upon oral evidence, and no order, as contemplated by Code, § 2742, was made for presenting the evidence in the form of depositions, or for reducing to writing the testimony offered upon the trial. No exceptions were taken to the decree, or any rulings of the court made during the progress of the trial. The appeal was perfected August 1, 1878.

1. PRACTICE:
change of statute: trial de novo.

The plaintiff asks for a trial *de novo* in this court, which is resisted by defendant.

If the question thus raised is to be determined under Code, § 2742, the case, for the failure to comply with its provisions, cannot be tried here *de novo*. But plaintiff insists that the statute named is not applicable, for the reason that it is repealed by Acts Seventeenth General Assembly, chapter 145, which restore the practice existing before the enactment of the repealed provision. We are required to determine the correctness of this position.

The repealing act took effect July 4, 1878 (Code, § 34), after the trial and before the appeal was perfected. It is not, by its terms, made applicable to cases before tried. Code, § 45, par. 1, provides that "the repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed." It does not require discussion to show that under this provision the proceedings in the case upon appeal must conform to the statute in force when the action was prosecuted in the court below. *Rivers v. Cole*, 38 Iowa, 677.

The rule we adopt under these statutes operates most justly in its application to cases of this character. The parties, unless notified by the order requiring the case to be tried upon depositions or the evidence to be taken in writing at the trial, would not be advised that a trial *de novo* would be claimed or could be granted in this court. They would not, therefore,

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prepare for such trial here upon the trial in the court below; the time and place, as all practitioners know, for the most necessary preparation as to the character and extent of their testimony, and the form and manner of preserving it to be presented in this court. It will be readily seen that a case might be brought here in a condition rendering justice unattainable, if this rule be not enforced.

Counsel for plaintiff insist, citing *Tilton v. Swift*, 40 Iowa, 78, that as the rule of Code, § 2742, pertains to the remedy and to the practice of the court, it may be changed by statute and a different rule applied to pending cases. Doubtless the Legislature may so enact, but nothing of the kind has been attempted which is applicable to this case. On the contrary, Code, § 45, par. 1, which is not affected by the act repealing Code, § 2742, requires the rule of the last named section to be applied to proceedings commenced under it.

The record before us does not present the case in a condition to be tried upon errors. Indeed, the plaintiff does not ask such a trial. We can do nothing but affirm the judgment of the court below.

AFFIRMED.

SMITH, CLEARY & ENRIGHT V. LEDDY ET AL.

1. **Intoxicating Liquors:** JUDGMENT: COLLATERAL ATTACK. The term "liens," as employed in section 1550 of the Code, does not include the lien of a judgment, and if a judgment be rendered in favor of a party selling intoxicating liquors, it cannot be pleaded in another action that such judgment is void because the subject-matter of the action comes within the prohibition of the statute.

Appeal from Dubuque Circuit Court.

TUESDAY, DECEMBER 10.

THE petition states that the plaintiffs recovered in said court a judgment against James Mulligan, and caused an exe-

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cution to issue therein, which was placed in the hands of the defendant Leddy, who at the time was sheriff of Dubuque county; that at the time said execution was placed in the hands of said Leddy, Mulligan was the owner of personal property in Dubuque county, out of which the execution aforesaid could have been satisfied; but that said Leddy, in violation of his duty, failed to levy thereon, to the damage of the plaintiffs.

The answer denied certain allegations of the petition, and in two counts special defenses were pleaded.

The second count stated that the plaintiffs' claim was founded upon the sale of intoxicating liquors sold contrary to and in violation of the statutes of Iowa for the suppression of intemperance, and that the judgment upon which the execution was issued was obtained against Mulligan for the value of intoxicating liquors sold him by said plaintiffs, who knew at the time that Mulligan purchased said liquors to be sold again contrary to law.

The third count stated that, after the recovery of said judgment, Mulligan had made an assignment for the benefit of his creditors, and that George Salot was the assignee. It was further stated that said Salot and Mulligan were interested in the subject-matter of the action, and that the judgment was obtained for intoxicating liquors sold Mulligan. The allegation in this respect, being the same as in the second count, it was asked that Salot and Mulligan be made parties defendant.

Salot and Mulligan also filed their petition of intervention, setting up the assignment, and, in substance, pleading the same defense in relation to intoxicating liquors as in the second count, and asked that the judgment be declared null and void.

To so much of the answer and petition of intervention as pleaded as a defense that the judgment was obtained for intoxicating liquors sold contrary to law the plaintiffs demurred on several grounds, among which were that such

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defense should have been pleaded in the original action, and that the judgment is conclusive as to the question presented.

The demurrer was sustained, and the plaintiffs appeal.

H. T. McNulty, for appellants.

Shiras, Van Duzee & Henderson, for appellees.

SEEVERS, J.—The statute provides: "All payments or compensation for intoxicating liquor hereafter sold in violation of this act, whether such payments or compensation be in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such goods, labor, or other thing. All sales, transfers, conveyances, mortgages, liens, attachments, pledges and securities of every kind, which, either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this act, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this State, for intoxicating liquors, or the value thereof, sold in any other State or country contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act; nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor, with lawful intent, may have been illegally deprived of the same." Code, § 1550.

It is insisted that under this statute this judgment is absolutely void for three reasons—*First*, because all payments made for intoxicating liquors sold contrary to law may be recovered back; *second*, because no action can be maintained

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for intoxicating liquors or the value thereof sold contrary to law; and, *third*, because all securities of every kind given therefor are declared to be null and void.

As to the last reason we have to say that judgments are not mentioned as among the securities which are rendered void, and this fact has an important bearing on all the reasons assigned. The liens and securities mentioned in the statute are mostly those executed by the party.

If the intent had been to declare void all judgments, it would have been likely to have been so declared in express words. A judgment, when rendered in the Circuit or District Court, becomes a lien on real estate. The "liens" mentioned in the statute do not include such, because, if it should be so held, the result would be the lien would be void and the judgment in force. Again, "attachments" are declared to be void, but judgments not mentioned. This, to our mind, clearly indicates the intent of the General Assembly, which was to declare all liens or securities executed by the party, and including attachments, void. In other words, no action can be maintained, and all securities not reduced to judgments are void. It seems to us the statute has been carefully drawn, so as not to include judgments.

The fact that no action can be maintained does not render the judgment void; but this fact, and that attachments are declared void, implies that before judgment is the proper time for the defense now interposed to be presented. The court, on its own motion, cannot direct an issue to be formed and try the question whether the action is brought to recover the value of intoxicating liquors sold contrary to law; nor can it take judicial knowledge that such is the case. But the defense must be pleaded. Mulligan had his day in court. He kept his mouth shut when he had the opportunity to speak, and is estopped from now opening it. *Dalter v. Laue & Guye*, 13 Iowa, 538 (542); *Hackworth v. Zollars*, 30 Id., 433; *Dewey v. Peck*, 33 Id., 242.

If this be so as to Mulligan, for a much stronger reason

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the sheriff cannot avail himself of such a defense, and the assignee, Salot, stands in the shoes of Mulligan.

The construction placed on the statute renders a review of the authorities cited unnecessary, as they are clearly inapplicable.

AFFIRMED.

50	116
136	267

McKISSICK v. THE MILL OWNERS' MUTUAL FIRE INS. CO.

1. **Insurance: ALIENATION OF PROPERTY.** A policy of insurance stipulated that if the property should become alienated the policy would be void, unless assigned by consent of the president and secretary to the alienee. The property was sold under a decree of foreclosure—the mortgage, however, incorrectly describing the property. The year for redemption expired, but prior to that time an action was instituted to correct the mistake, which resulted in a decree therefor: *Held*, that the policy became void for non-compliance with the condition respecting alienation.
2. ———: **MORTGAGE.** The mortgagee did not have the right to redeem after the decree correcting the description had been rendered.

Appeal from Fremont Circuit Court.

TUESDAY, DECEMBER 10.

ACTION on a policy of insurance upon a flouring mill, against loss by fire or lightning, to the amount of two thousand dollars, issued to J. P. McKissick; the loss, if any, to be paid to his wife, the plaintiff in this action. There was a judgment for plaintiff. Defendant appeals. The facts of the case, involved in the question of law ruled by the court, appear in the opinion.

G. H. Crosby and Barcroft, Given & Drabelle, for appellant.

C. H. & W. S. Wynn, for appellee.

BECK, J.—I. The defendant, a mutual insurance company, issued the policy sued upon in this case on the 26th day of De-

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cember, 1876. The conditions and requirements of the articles
1. INSURANCE: of incorporation and by-laws of defendant were
alienation of incorporated into the contract of the policy by the
property. express terms of that instrument and of the application of insurance. They appeared upon the back of the policy. The articles of incorporation contain the following among other conditions: "When the property insured shall become alienated the policy thereon shall become void unless assigned by the consent of the president and secretary to the alienee."

The answer of the defendant sets up a breach of this condition of the policy, averring that the title of the property was alienated by operation of law, and there was no assignment of the policy to the alienee. An issue was joined upon this defense. The undisputed facts upon this branch of the case are as follows:

The insured purchased an undivided one-half of the mill November 20, 1875. It was situated upon lots 1 and 16, block 4, railroad addition to the town of Hamburg. He assumed to discharge certain incumbrances upon the property as payment of the consideration of the purchase; among them, a mortgage executed by his grantor and his co-tenant, made prior to the purchase, to secure the payment of three thousand nine hundred and sixty dollars and fifty cents.

This mortgage described the lots upon which the mill was situated, as being in *Phelps'* addition instead of the railroad addition. There was a decree of foreclosure rendered May 9, 1876, directing the sale of the property under the description contained in the mortgage, and the mill was duly sold by that description, June 24, 1876, for four thousand eight hundred and sixty-three dollars, subject to redemption in one year under the statute. On the 21st day of September, 1876, a proceeding was commenced to correct the misdescription of the property in the mortgage and the foreclosure proceedings; McKissick, the insured, being made a party. A proper decree was entered, making the correction, on the 4th day of October, 1877. A deed for the property, correctly describing it, was

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subsequently executed. On the 29th day of August, 1877, the mill was burned.

The time for redemption under the sale upon the foreclosure of the mortgage had expired at the time of the destruction of the mill by fire. The court instructed the jury that "the evidence does not show such an alienation of the property at the time of the loss as to defeat a recovery."

The insured, as we have said, was made a party to the proceedings to correct the description of the property, and the relief asked was that the correction be made, and a deed be issued on the sheriff's certificate correctly describing the property, and that McKissick's interest be subject to the foreclosure and sale. He did not in the court below, and does not in this court, claim that he holds any other than the statutory right of redemption.

In view of his appearance to the action to correct the mistake in the mortgage proceeding, and to authorize the execution of a deed upon the sale, we think if he had any right of redemption other than that based upon the statute, and existing by reason of his not having been made a party to the original foreclosure action, he waived it by not setting it up in his answer made before the loss. His rights are the same as though he had been made a party in the original foreclosure case. This the counsel for plaintiff directly admit in argument.

But it is insisted by counsel that McKissick's right of redemption was not cut off by the sale, within the time prescribed by the statute, for the reason that, on account of the incorrect description, the mill was not covered by the mortgage, decree, sale, etc. Just here is their mistake. The parties, in all their transactions—in the mortgage and in the agreement of McKissick to pay it, and the court in the decree, and the sheriff in the sale—all acted upon and with regard to the property in question. It was covered by the mortgage, the decree and the sale, as between the parties interested and McKissick. It was the property contemplated by all, and was

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in fact affected by the transactions. Because this is true the decree correcting the error was rendered. The property having been actually sold upon the decree, and the time of redemption having expired, McKissick had no right to redeem—the alienation was complete. See *Strong v. Manufacturers' Ins. Co.*, 10 Pick., 40; *Clark v. New England Ins. Co.*, 6 Cush., 342. This was before the destruction of the mill. He had no interest in it and suffered no loss. The policy, upon the alienation, became void according to its express terms.

II. Counsel for plaintiff insist that upon the correction of the mortgage, decree and sale McKissick has a right to
2. ——— : mort.
page. redeem under the statute for the reason that the property affected thereby was not the same that was covered by the mortgage; that is, the mortgage and decree, as reformed, included property not described in the instrument as executed. They rely upon *Provost v. Rebman*, 21 Iowa, 419. Conceding, for the present, the rule of this decision to be as claimed by counsel, the case before us is not within it for these reasons: The proceeding to correct the mortgage, decree and sale sought to subject McKissick's rights thereto and cut off redemption by him. He interposed no claim that he had the right to redeem on account of the error, or because he was not made a party to the original foreclosure proceeding. The claim now made by counsel was not made by him. It surely cannot be made by others after he has abandoned it. But the facts of *Provost v. Rebman* distinguish it from the case before us. In that case the reformation of the mortgage was for the purpose of subjecting property not attempted to be described at all. The property in question in the case before us was incorrectly described. In that case it was said that equity would not create a mortgage and cut off the equity of redemption at a single stroke. In this case the property is covered by the mortgage, by an erroneous description, which was corrected by the supplemental proceedings. The original decree cut off the equity of

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redemption, and the expiration of time cut off the redemption under the statute.

We reach the conclusion that the instruction given to the jury, above quoted, was erroneous, as the property had been alienated before its destruction by fire.

Other questions discussed by counsel need not be considered, as the conclusion we reach makes a final disposition of the case.

REVERSED.

J. M. BRUNSWICK & BALKE CO. v. VALLEAU.

1. **Vendor and Vendee:** ARTICLE WHOSE USE MAY BE UNLAWFUL. Where an article has a lawful use, and has no unlawful use except as a mere incident to the lawful use, the vendor is not bound to presume that it will be used unlawfully, and will not, therefore, be deemed to have knowledge that it will be.
2. ———: ———: RULE APPLIED. It constitutes no defense to an action for the purchase price of a billiard table that it may be used for the purpose of gambling, and knowledge that it will be so used cannot be inferred from the fact that the table is accompanied with a pool set, and rules for playing the game.

Appeal from Winneshiek District Court.

TUESDAY, DECEMBER 10.

ACTION upon five promissory notes. The answer avers that the sole consideration of the notes was "two billiard tables sold by plaintiff to defendant in Iowa, with the knowledge, understanding, agreement, intent and purpose on the part of plaintiff and defendant that the same were to be and should be used in the town of Decorah, Iowa, as implements for gambling, in violation of the statutes of Iowa, and that in pursuance of such intent the tables were so used." There was a trial by jury, verdict and judgment for the plaintiff. Defendant appeals.

J. M. Brunswick & Balke Co. v. Vallean.

Willett & Wellington, for appellant.

E. E. Cooley, M. N. Johnson & Bro. and G. L. Faust, for appellee.

ADAMS, J.—I. The court gave an instruction which is in the following words: "You are instructed, as matter of law, that the mere fact that the plaintiff had knowledge that the tables were to be used for the purpose of playing games, to-wit: pin-pool and billiards, thereon, constitutes no defense to plaintiff's action on the notes. In addition to the knowledge on the part of plaintiff that the tables were to be used for such gambling purposes, it must further appear from the evidence that it was a part of the contract that they should be so used, and that the plaintiff has done something in aid or furtherance of the unlawful design beyond the mere sale with knowledge of the illegal intent of the purchaser." The giving of this instruction is assigned as error.

1. VENDOR and vendee: article whose use may be unlawful.

The doctrine of the instruction was held in *Tracy v. Talmadge*, 14 N. Y., 162. It was held, however, in *Spurgeon v. McElwein*, 6 Ohio, 442, that a carpenter could not recover for labor done in erecting a nine-pin alley, appurtenant to a coffee-house.

By statute it was provided that it should be unlawful for tavern keepers and retailers of spirituous liquors to keep a nine-pin alley in connection with their business; and it was held that the plaintiff who built the nine-pin alley should be deemed to have knowledge that it was to be used as a nine-pin alley in connection with the so-called coffee-house, which use, it seems to be conceded, would have been unlawful. There was no contract that the nine-pin alley should be used as such, nor had the plaintiff any interest in it, nor did he do anything to promote its use as a nine-pin alley except to construct it. The court, however, said: "If one intends to aid another in an illegal object he shall not be assisted by the

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law." The defendant relies upon this case as holding the doctrine for which he contends. It is not, we think, to be denied that it holds a different doctrine from the instruction. But the plaintiff claims that if the court erred in the instruction it was error without prejudice, and we think that this position is well taken. The mere keeping of billiard tables is not unlawful, as was the keeping of the nine-pin alley in connection with the coffee-house; nor is the use of billiard tables as such unlawful. Gambling is no part of the game of billiards. It may be done in connection with the game, as it may in connection with cards, or chess, or croquet, but gambling does not inhere in the game itself. The counsel for the defendant would concede this, but they maintain that it is shown in evidence that the tables were sold to be used in a saloon, and that they were so used; and that gambling is nearly always done in connection with the game of billiards in a saloon, while it is only occasionally done with cards; and so the sale of billiard tables to be used in a saloon must be deemed to be unlawful, while the sale of a pack of cards ordinarily would not be. In our opinion the distinction does not rest upon any legal foundation. The sale of cards, with knowledge that they are to be used in gambling, would, under the doctrine of *Spurgeon v. McElwein*, be unlawful; and if cards were made for no other purpose the seller, under the authority of that case, would be deemed to have knowledge that they were to be used in gambling. Without such knowledge the sale is not unlawful.

It is urged, however, by the defendant that the plaintiff did have knowledge that the tables were to be used in gambling. They rely not only upon the fact that the plaintiff knew that they were to be used in a saloon, where, as the evidence shows, gambling is almost universally carried on in connection with billiard tables, but upon the fact that there was sold in connection with the tables what is called a pin-pool set, and printed rules for playing the pin-pool game. These rules are introduced in evidence, and it is claimed that gambling is a part

Wilson v. Fulliam.

of the game as therein laid down. The rule relied upon more especially is in these words:

"If a player neglects to claim the pool when he has made it before the next play, he must wait until his turn to play comes again, when he may declare pool; but if another makes pool in the meantime, that other is entitled to it."

It is said that pool means stakes, and so the rule contemplates playing for stakes. The testimony of persons acquainted with the game was introduced, but we have to say that it fails to satisfy us that the word *pool*, as used in the game, necessarily means stakes.

It appears to us to be a word applied to the result in favor of the winner, and that money or some other valuable thing may or may not be staked upon the result, as the parties agree.

In our opinion the law is that where an article has a lawful use, and has no unlawful use except as a mere incident to the lawful use, the vendor is not bound to presume that it will be used unlawfully, and will not, therefore, be deemed to have knowledge that it will be. Knowledge of the unlawful intention must be distinctly shown. 1 Daniels on Negotiable Instruments, 159. In this case the knowledge is not distinctly shown.

AFFIRMED.

WILSON V. FULLIAM ET UX.

1. **Receipt:** ALTERATION IN. Evidence considered which was held to establish an alteration in a receipt.

Appeal from Muscatine District Court.

TUESDAY, DECEMBER 10.

ACTION to foreclose a mortgage given by the defendants to the plaintiff's testator, Edward Negus, to secure three prom-

Wilson v. Fulliam.

issory notes, for six hundred dollars each, executed by the defendant Elizabeth Fulliam, the wife of the defendant George W. Fulliam. The notes were dated August 13, 1873, and made payable in one, two and three years respectively. The first note was paid and surrendered. The action is brought upon the last two. The only question made in the case is in regard to an alleged payment. In December, 1873, an indorsement of seventy dollars was made upon the first note, and there is no dispute between the parties in regard to its correctness. But the defendants claim that in the same month they paid, in addition to the sum of seventy dollars thus indorsed, the further sum of three hundred and seventy dollars, and in support of that claim they introduced in evidence a receipt, which is in these words:

“MUSCATINE, December 17, 1873.

“Received of Elizabeth Fulliam three hundred and seventy dollars, on a note due August, 1874.

“ELLWOOD NEGUS.”

The plaintiff claims that the receipt was given for only seventy dollars, and for the same seventy dollars which is indorsed on the note, and that the figure 3 after the sign of dollars has been wrongfully interpolated since the receipt was given. The court found for the plaintiff upon this point, and rendered judgment and decree accordingly. The defendants appeal.

Richman & Carskaddan, for appellant.

Brannan & Jayne, for appellee.

ADAMS, J.—The plaintiff claims that the date of the receipt and the date of the indorsement are the same, to-wit: December 17, 1873. The defendants claim that the date of the indorsement is December 7, 1873. The note is submitted to us for inspection, but the fact is that a small piece has disappeared from the body of the note

1. RECEIPT:
alteration in.

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where the figure 1 might have been written. As the piece thus wanting is not dissimilar in size and shape to what the figure would naturally have been, we have to say that it appears very much as if the removal were done by design. Upon close inspection it appears to us also that an ink spot remains which might have been the bottom of a figure 1.

There is another circumstance tending to show that the date of the indorsement is December 17th, and not December 7th. On the 31st day of August, 1874, the defendants paid ninety-eight dollars and eighty-three cents as the balance due on the note. The note had been left with a certain bank for collection, and the bank clerk testifies that he computed the interest, and found the amount due on that day. There had been three indorsements upon the note, viz.: Three hundred dollars, September 18, 1873; one hundred and fifty dollars, November 21, 1873; and the indorsement of seventy dollars. Assuming the date of the last indorsement to be December 17, 1873, and computing the interest to each payment, and deducting the payment, the amount due August 31, 1874, if we have made no error, was ninety-eight dollars and eighty-five cents, or only two cents more than the amount found due by the bank clerk, and paid by defendant. We regard this as a circumstance tending to show that at that time the date of the indorsement of the seventy dollars appeared to be December 17th.

Again, the language of the indorsement is very peculiar, and tends to confirm us in our conviction that it was made at the time the receipt was given. It appears to us to have been copied from it. The indorsement is in these words: "Received, Elizabeth Fulliam, seventy dollars, *on a note due August, 1874.*" The words used to identify the note were superfluous, and we do not think that they could have been added from any supposed necessity, and we see no way to account for them except to suppose that they were copied from the receipt.

It is true that the defendant George W. Fulliam testifies

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that there were two distinct payments—one for seventy dollars, made December 7th, and one for three hundred and seventy dollars, made December 17th. He says that he made the payments, took the receipt in question, and that it has not been changed. But his credibility is very greatly impaired, if not entirely destroyed, by circumstances already partly detailed. On the 17th of December there was due on the first note only eighty dollars, and a little interest; yet, according to his theory, he paid on that day three hundred and seventy dollars, and took a receipt for it as a payment made wholly upon that note. This circumstance alone we should not be disposed to regard as of very great importance, because he was owing other notes, and might have been careless in regard to the language of the receipt. But the note paid was not taken up. Now we cannot suppose that Fulliam did not know that three hundred and seventy dollars would much more than pay the first note, and no good reason is shown why the note was not taken up. It was not only allowed to remain outstanding, but a few months afterward the defendant paid it again. The amount due was computed precisely as if no payment of three hundred and seventy dollars had been made, and the amount found due by such computation was paid without a word of complaint. Not only that, but at the same time, as appears, interest was paid on the last two notes precisely as if no payment of three hundred and seventy dollars had been made, when in fact, according to defendant's theory, nearly three hundred dollars of the three hundred and seventy dollars was paid on the second note.

The counsel for the defendants claim that this was mere carelessness, or that the defendants might have supposed that the whole matter could be properly adjusted when the last note should be taken up.

That this transaction should have been the result of mere carelessness is to us incredible; nor are we disposed to believe that the defendants relied upon having a general adjustment when the last payment should be made. This

Wilson v. Fulliam.

supposition, under the peculiar circumstances of the case, would have involved carelessness equally incredible. When Fulliam took up the first note he testifies that he tore up the note and threw it away, and that it was only by the advice of counsel, after the commencement of this action, that he collected the scattered pieces and pasted them together. Now the defendants were holding a receipt for three hundred and seventy dollars, as they claim, showing a payment solely upon the first note. They pay the note wholly otherwise, in four different payments, take up the note, tear it up and throw it away, expecting, according to their theory, that some two years later, when all the parties might be dead, a receipt for payment purporting to be made expressly upon the first note would be allowed upon a subsequent one, and that, too, with the first note with its indorsements was destroyed.

It is insisted by the plaintiff that the figures 370, as they appear in the receipt, are crowded, and also that the figure 3 does not appear to be in the handwriting of the plaintiff's testator, who it is admitted drew the receipt. Various papers for a comparison of handwriting are shown us. An inspection of them impresses us, although not strongly, with the correctness of the plaintiff's claim. On the other hand we have the testimony of one Knott, who says he was present when the three hundred and seventy dollars was paid and the receipt in question was given, and he thinks it was written as it appears now. But evidence was introduced which satisfies us that the payment which Knott saw made was made later, and on the second note.

In view of all the circumstances as disclosed we are fully satisfied that the receipt was given for a payment made on the first note, according to the express purport of it, and was given for seventy dollars, which was indorsed as of that date, of which the defendants have had the benefit.

AFFIRMED.

Cook v. Blair.

COOK V. BLAIR.

1. **Evidence:** DEPOSITION. Where a deposition has been taken it may be read on the trial if the witness is not in court, notwithstanding the reason given in the deposition for taking it be not a valid one.
2. ———: EXAMINATION OF WITNESS. An objection to a question, which is simply a departure from a previous question, and put to the witness for the purpose of obtaining a modification to the former answer, may properly be sustained.

Appeal from Linn District Court.

TUESDAY, DECEMBER 10.

THE plaintiff's intestate, Isaac Cook, brought this action to recover for professional services rendered as an attorney at law. The case was referred to a referee, who found that the intestate's services were of the value of four thousand five hundred dollars. The court confirmed the report, and rendered judgment in favor of the intestate for that amount, with interest. The defendant appeals.

R. H. Gilmore and Fouke & Lyon, for appellant.

Hubbard, Clark & Deacon, for appellee.

ADAMS, J.—I. Upon the trial the plaintiff offered in evidence the deposition of N. M. Hubbard. The defendant objected upon the ground that it did not appear
1. **EVIDENCE:** deposition. that the witness could not have been present at the trial. The reason given in the deposition for its being taken is that the witness expected to be occupied in the U. S. Circuit Court at Des Moines at the time set for the hearing of this case before the referee. But it appears that the case was not heard at the time set. Whether the reason given in the deposition for taking it was sufficient, we need not determine. No objection appears to have been made to its being

Cook v. Blair,

taken. Having been taken, it was entitled to be read, unless the witness was in court. Code, § 3743. We think there was no error in admitting it.

II. I. M. Preston, being examined as an expert in regard to the value of the intestate's services, was asked by defendant, on cross-examination: "Do you take into
2. ———: ex-
amination of
witness. consideration, in giving this answer, that the sum of eleven thousand eight hundred dollars to fourteen thousand eight hundred dollars would be paid back by the county in the event of the failure of the suit?" The plaintiff objected to the question, and the objection was sustained.

The services in question were rendered in defending a tax title to certain lands in Nebraska which the defendant claimed to hold. The defendant's theory was that if his title failed, he would, nevertheless, receive from the county in which the land was situated the amount paid, and a penalty of forty per cent per annum, which was about half as much as the land was worth, and accordingly the real amount involved in the case was about half the value of the land. The question objected to relates to the answer to the previous question. In the previous question the witness was asked to make an estimate upon the supposition that from eight thousand dollars to nine thousand dollars would be paid back. Having answered the question, he was asked if he took into consideration in giving the answer that from eleven thousand eight hundred dollars to fourteen thousand eight hundred dollars would be paid back. We see no reason for asking such a question. It was a departure from the previous question, and yet put to the witness for the sole purpose of obtaining a modification of the answer to that question.

III. The court found, as a fact, that the land in controversy was worth twenty thousand dollars. It is claimed that the finding is not supported by the evidence. The amount of land was nine thousand five hundred acres, and one witness, the county treasurer of the county in which the land

Ransier v. Vanorsdol.

was situated, testified that it was worth from three dollars to three dollars and fifty cents per acre. The finding cannot be disturbed.

IV. It is assigned as error that the court omitted to find that, if the title had failed, the county in which the land was situated would have been compelled to repay the amount paid and forty per cent per annum thereon. But the referee was not specially requested to make such finding, and, in the absence of such request, we do not think it was error to omit it. The referee must be presumed to have taken into consideration whatever evidence there was as to the right to such repayment, so far as it was necessary to do so, in properly weighing the evidence as to the value of the services.

V. It is insisted that the amount allowed is greater than is justified by the evidence, but the evidence is conflicting.

AFFIRMED.

50	130
80	155

RANSIER V. VANORSDOL ET AL.

1. **Evidence:** ALTERATION OF INSTRUMENT. An alteration in a written instrument evidencing an executed contract, by the beneficiary thereunder, for whom the contract has performed its work, will not discharge the other party.
2. ———: ———: **RULE APPLIED.** The insertion of the name of another party in a bill of sale after its execution and delivery, and after possession of the property has been taken thereunder by the vendee, will not divest him of the right of possession.

Appeal from Buchanan Circuit Court.

TUESDAY, DECEMBER 10.

THE plaintiff alleges that he is the absolute owner of one bay mare, of the value of one hundred and twenty-five dollars, and one two-seated sleigh, of the value of sixty dollars; that said property was taken by Vanorsdol, sheriff, under a bill of sale executed by plaintiff to Shadbolt & Boyd, to secure

Ransier v. Vanorsdol.

the payment for goods for which plaintiff might become indebted during the year 1876, in the nominal sum of one thousand dollars; that the debt for which said bill of sale was given as security was fully paid before the property was taken. The plaintiff prays judgment for the delivery of the property, or for its value. The defendant Vanorsdol answered, admitting that he took the property, but alleging that he took it under a bill of sale executed by C. E. Ransier and J. C. Ransier to Shadbolt & Boyd, and averring a want of sufficient knowledge or information of the other allegations of the petition to form a belief. Shadbolt & Boyd were permitted to intervene as parties defendant, and answered, in substance alleging that C. E. Ransier and J. C. Ransier executed to Shadbolt & Boyd the bill of sale in question to secure an indebtedness of said J. C. Ransier, in the sum of one thousand four hundred and thirty-six dollars and sixty-two cents; that J. C. Ransier was the unqualified owner of the property, and the indebtedness, to secure which the bill of sale was given, is due and unpaid; and that Vanorsdol, acting as sheriff, took the property under said bill of sale. The plaintiff replied, alleging that the bill of sale has been altered, since its execution, by interlining and affixing thereto the name of J. C. Ransier, without plaintiff's assent, and denying that the claim against J. C. Ransier is any claim against the plaintiff.

The cause was tried by the court, and the following finding of facts and law was submitted: "I find as a fact that the property in question was taken by the defendant W. S. Vanorsdol, sheriff, upon a bill of sale to Shadbolt & Boyd, executed on the 3d day of March, 1876; that at that time J. C. Ransier was indebted to said Shadbolt & Boyd more than one thousand dollars; that said indebtedness is not fully paid; that said bill of sale was intended as a mortgage, and was given to secure said indebtedness, and for the further purpose of enabling said plaintiff to obtain credit from said Shadbolt & Boyd to carry on the wagon and carriage business at Inde-

Ransier v. Vanorsdol.

pendence; that plaintiff was not indebted to Shadbolt & Boyd at the time said bill of sale was executed; that said Shadbolt & Boyd agreed to extend credit to plaintiff if said bill of sale was given to secure said old indebtedness of J. C. Ransier; that said bill of sale was changed, after it was executed by plaintiff, and delivered to the agent of Shadbolt & Boyd, without the knowledge or consent of plaintiff, by the addition of the name of J. C. Ransier, and by the said J. C. Ransier signing the same and becoming a co-maker. I find there has been paid on the debt, secured on the bill of sale, the sum of one thousand and seventy dollars, by C. E. Ransier.

"I find, as a matter of law, that the change in said instrument by such alteration, and by said J. C. Ransier signing the same as a co-maker, was such a change as to discharge plaintiff from all liability thereon.

"I find also, as a matter of law, that it is immaterial whether J. C. Ransier owned any interest in the property in question at the time said bill of sale was executed. Plaintiff had an unrecorded bill of sale to him from said J. C. Ransier, at the time, of which Shadbolt & Boyd had notice. They derive their title from plaintiff, and cannot now be heard to dispute it."

Pursuant to these findings the court rendered judgment for plaintiff for one hundred and eighty-five dollars. The defendants appeal.

H. W. Holman, for appellants.

C. E. Ransier and Lake & Harmon, for appellee.

DAY, J.—I. The bill of sale was executed in consideration of one thousand dollars. The court found as a fact that J. C. Ransier was indebted to Shadbolt & Boyd more than one thousand dollars, which indebtedness is not fully paid; that the bill of sale was intended as a mortgage to secure said indebtedness, and that there has been paid on the debt secured by the bill of sale the sum of one thousand and seventy dol-

Ransier v. Vanorsdol.

lars. The appellant concedes that if one thousand and seventy dollars has been paid on the debt secured by the bill of sale, the security should be discharged. But it is claimed that this finding of fact by the court is altogether without support from the testimony. We think this position of appellant is correct. It is true C. E. Ransier testifies: "Before the sheriff took the property on that bill I had paid Shadbolt & Boyd every dollar I owed them. That bill of sale was given in the nominal sum of one thousand dollars. I had paid Shadbolt & Boyd one thousand and seventy dollars and fifty cents before the sheriff took the property." Here is evidence sufficient to support a finding that C. E. Ransier had paid all he owed, but the bill of sale was given, as the court finds, to secure an indebtedness of J. C. Ransier. C. E. Ransier, being recalled, testified as follows: "The whole amount that I ordered of Shadbolt & Boyd, on the strength of that bill, was five hundred and some odd dollars. I have paid them. I paid them, in all, one thousand and seventy dollars." It thus appears very clearly, and without any conflict of testimony, that of the one thousand and seventy dollars which C. E. Ransier testifies he paid, a little over five hundred dollars was paid upon a new indebtedness which he created after the bill of sale was executed, leaving but a little over five hundred dollars to apply on the indebtedness of J. C. Ransier, secured by the bill of sale. The finding of the court that one thousand and seventy dollars has been paid on the debt secured by the bill of sale is not supported by the evidence, if the bill of sale was executed to secure an indebtedness of J. C. Ransier. The finding that the bill of sale was executed to secure a debt of J. C. Ransier is sufficiently supported by the evidence.

II. It is urged that the finding of the court that the bill of sale was changed after it was executed and delivered by the addition of the name of J. C. Ransier, without the consent of C. E. Ransier, is not supported by the evidence. Upon this point the evidence was conflicting. There is not such want

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of evidence in support of the court's finding that we would be authorized to set the finding aside.

III. It is urged that the court erred in the finding of law that the change in the bill of sale, by J. C. Ransier's signing the same as co-maker, was such as to discharge plaintiff from all liability thereon. In the determination of this question it becomes necessary to consider the attitude of the case, and the office which the bill of sale now performs. The defendants have taken possession of the property described in the bill of sale, and have disposed of it in satisfaction of the debt secured. They do not need, and they do not ask, any affirmative relief based upon the bill of sale. All that they need, and all that they ask, is to be protected in the rights which they have acquired. As to them the contract has been executed. In 1 Greenleaf on Evidence, § 568, referring to the effect of alterations in instruments, it is said: "But here, also, a further distinction is to be observed between deeds of conveyance and covenants; and, also, between covenants or agreements executed, and those which are still executory. . For if the grantee of land alter or destroy his title deed, yet his title to the land is not gone. It passed to him by the deed. The deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee, but the estate remains in him until it has passed to another by some mode of conveyance recognized by the law. The same principle applies to contracts executed in regard to acts done under them." See *Davidson v. Cooper*, 11 M. & W. 778; *Kendall v. Kendall*, 12 Allen, 92; *Cheeseman v. Whittemore*, 23 Pick., 231.

In this case the execution and delivery of the bill of sale created a title and right to possession of the property in the defendants. This possession having been assumed, it may, under the doctrine of the authorities above referred to, be maintained under the bill of sale, notwithstanding the alteration complained of.

The State v. Hessians.

IV. It is urged that the court erred in the following finding of law: "That it is immaterial whether J. C. Ransier owned any interest in the property in question at the time said bill of sale was executed. Plaintiff had an unrecorded bill of sale to him from said J. C. Ransier at the time of which Shadbolt & Boyd had notice. They derive their title from plaintiff, and cannot now be heard to dispute it." Under the views we have expressed of the case it is unnecessary to determine as to the correctness of the law contained in this finding. Having executed a bill of sale to C. E. Ransier, J. C. Ransier would be estopped from disputing C. E. Ransier's ownership of the property. We have seen that the title, conveyed by the bill of sale from C. E. Ransier, may be maintained. J. C. Ransier being estopped from claiming the property, if the defendants succeed in holding C. E. Ransier's interest in and title to the property, they need nothing more.

REVERSED.

THE STATE V. HESSIANS ET AL.

1. **Criminal Law: LARCENY: RECENT POSSESSION.** An instruction in these words was held to be correct: "When property recently stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into the possession thereof; and, unless he shows that he came honestly into possession of said property, the law will presume that he stole the same."

50	135
118	529
50	135
122	4
50	135
144	287

Appeal from Webster District Court.

TUESDAY, DECEMBER 10.

THE defendants were indicted, tried and convicted for the larceny of a bull, the property of one John Kohl.

They appeal to this court for a reversal of the judgment against them.

The State v. Hessians.

Albert E. Clarke, for appellants.

John F. McJunkin, Attorney General, and *M. D. O'Connell*, District Attorney Ninth Judicial District, for the State.

ROTHROCK, CH. J.—I. It is first urged that a new trial should have been granted because the verdict was not supported by the evidence. We have presented to us in print what is claimed to be the substance of the evidence only. Conceding this to be a full and accurate abstract, we cannot reverse upon this ground. There is positive evidence that the animal found in the defendants' possession was the property of John Kohl. It is true there are more witnesses who testify that it was the property of the defendants. Here is a conflict which it was the province of the jury to determine, and we cannot say that they determined it incorrectly. We have neither seen nor heard the witnesses, and have only the substance of their evidence.

Kohl lost his bull in September, 1876. More than a year afterward he found the animal, now in controversy, in possession of the defendants. It is insisted that there is no evidence that defendants are guilty of larceny, because it is not shown that the animal was stolen. It is true this possession alone would not be so recent as to raise any presumption against the defendants, but G. M. Gardner, a witness for the State, testified as follows: "Lives on the road between Fort Dodge and the residence of defendants. In September, 1876, saw defendants driving a bull answering the general description of the bull in question and a heifer along the road toward home. Saw this bull, which Kohl took from defendants as his, at defendants' farm. Defendants said they bought it of N. R. Jones."

Frank Richter testified that "he had seen the bull taken from defendants by Kohl, as his, at defendants' farm last fall (1877). They tried to trade me the bull for two cows. John (one of the defendants) said they got him out on the Lizard."

The State v. Hessians.

Another witness testified that in September, 1876, just before the bull was stolen, he thought he saw one of the defendants with Kohl's cattle.

Upon the trial the defendants claimed that the bull in question was their own, and that they raised him from a calf. A brother of defendants testified that "it was born on our farm."

In view of this evidence we are not prepared to say that the jury were not justified in finding that the animal was stolen, and that he was found in defendants' possession while they were in the very act of driving him away.

II. Objection is made to the fourth instruction given by the court to the jury. It is in these words: "When property recently stolen is found in the possession of any person the burden of proof is upon such person to show how he came into the possession thereof, and unless he shows that he came honestly into the possession of said property the law will presume that he stole the same."

1. CRIMINAL
law: larceny:
recent posses-
sion.

It is argued that such possession is but a circumstance from which the jury are authorized to raise a presumption, in connection with other circumstances in the case, to weigh against the defendant, and that it is erroneous to say that the law presumes guilt from the possession unexplained.

The abstract and argument do not set out any of the instructions excepting the fourth paragraph above quoted. What there may have been explaining and qualifying that instruction we cannot determine. The Attorney General, in his argument, refers to a part of the sixth instruction which states that "possession of stolen property unexplained is *prima facie* evidence of the guilt of one in whose possession it is found soon after the larceny."

The effect of the possession of property recently stolen is usually stated in very nearly the language of this sixth instruction.

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It is in the exact language of this court in the *State v. Taylor*, 25 Iowa, 273. See 1 Greenleaf, § 34. In Wharton's Criminal Law, 648, it is said: "The possession of property recently stolen is *prima facie* evidence of guilt in the possessor of the property, but it may be satisfactorily accounted for, as that the accused purchased it in a public manner, unconnected with circumstances of guilt."

"*Prima facie* evidence of fact is in law sufficient to establish the fact unless rebutted." 2 Bouvier's Law Dictionary, 170.

The rule, then, as usually stated, is that such possession of the stolen property is sufficient to establish the larceny unless rebutted.

Now we do not understand the fourth paragraph of the instructions as being essentially different from this rule. When it is said that the burden of proof is upon the person in possession to show how he came into the possession, it is only another form of expression for saying that the possession is sufficient to convict unless rebutted; and when it is said that unless he shows such possession to be honest the law will presume that he stole the property, it is no more than saying that he must rebut the presumption arising from such possession. He need not rebut this presumption by independent evidence, and we do not understand this instruction to so hold. There may be facts and circumstances connected with the possession which rebut guilt, or it may be shown in evidence that he has such an unexceptionable reputation as an honest man as to lead the jury to believe, in the absence of other evidence of guilt, that he acquired the possession of the property honestly.

III. The fifth and sixth instructions given by the court to the jury are objected to because there was no evidence tending to establish any of the facts upon which said instructions were predicated.

These instructions are not set out in the abstract. Part

Becker v. Becker.

only of the sixth instruction is given, and that in the argument of the Attorney General.

We find no error in this record, and are united in the opinion that the judgment must be

AFFIRMED.

50	139
136	36

BECKER V. BECKER ET AL.

1. **Jurisdiction: APPEAL: RE-DOCKETING.** It is not necessary that a *procedendo* should issue to give the court below jurisdiction, but if the case is re-docketed upon service of proper notice the case will stand for re-trial.
2. **Replevin: PRACTICE.** In a replevin suit, where the plaintiff has obtained possession of the property, the court is justified in exacting prompt obedience to its orders made for the purpose of obtaining a speedy trial.

Appeal from Howard District Court.

WEDNESDAY, DECEMBER 11.

ACTION to replevy a team of horses. There have been two trials in the court below. In the first the plaintiff was successful. Upon appeal the case was reversed. 45 Iowa, 239. The opinion was filed October Term, 1876. During the pendency of the appeal the court-house in Howard county was burned, and the original papers destroyed, including the replevin bond. On the 7th day of March, 1877, the plaintiff served upon the defendants a notice that the case would be brought on for trial at the next term of the Circuit Court (the court from which the case had been appealed), commencing on the 19th day of that month. This notice was the next day filed with the clerk.

On the 8th day of April, 1877, the Circuit Court, by consent of parties, ordered the case to be transferred to the District Court. On the 23d of April, 1877, the District Court made an order granting the plaintiff leave to file substituted

Becker v. Becker.

papers, but ordered that a sufficient bond, with sureties, should be filed as a condition of substitution, and ordered that they be filed within thirty days. On the 29th day of October, 1877, being the first day of the October Term of the District Court, no substituted papers having been filed, the defendants moved for judgment. On the following day the plaintiff filed a substituted petition and bond. Afterward the defendants moved to strike from the files the substituted petition and bond, which motion was sustained. The defendants then renewed their motion for judgment, which was sustained. The court then proceeded to hear testimony and found the value of the property to be two hundred and fifty dollars, and rendered judgment against the plaintiff and her surety on the original replevin bond for two hundred and fifty dollars and costs. The plaintiff and surety appeal.

H. C. McCarty, for appellant.

H. T. Reed, for appellee.

ADAMS, J.—I. The record does not show that any *proce-*
1. JURISDIC-
TION: appeal:
re-docketing. *dendo* issued from the Supreme Court. The
appellant claims, therefore, that it does not
appear that the court below acquired jurisdiction. In our
opinion it was not necessary that a *procedendo* should issue
to give the court below jurisdiction. *The State v. Knouse*, 33
Iowa, 365. The *procedendo* is mere evidence upon which the
court below would have been justified in acting; but where
a case is reversed, and the parties cause it to be re-docketed
in the court below, the court may proceed. In a certain
sense the court below retains jurisdiction so long as anything
remains to be done by it. Even while the case is pending in
the Supreme Court the jurisdiction of the court below is not
entirely divested. It may order a lost record to be substituted,
and do whatever else is proper to be done to enable the
Supreme Court to review its alleged errors. *Steiner v. Steiner*,

Becker v. Becker.

49 Iowa, 70. When a case is reversed which is retriable in the court below, and the sixty days have expired within which a petition for a rehearing may be filed, the case may be regarded as pending in the court below for retrial, and upon the court being satisfied of the reversal by *procedendo* or admission of parties, or otherwise, it may be brought on for trial under such rules as the court may prescribe.

In the case at bar it does not appear how it came to be re-docketed, but being re-docketed, the plaintiff, the unsuccessful party in the Supreme Court, caused a notice to be served under the rules of the court that the case would be brought on for trial. We think that there was not only no lack of jurisdiction, but no irregularity in the court's proceeding, of which the plaintiff can now properly complain.

II. It is insisted that the court erred in striking the plaintiff's substituted petition from the files. But we think the point is not well taken. The plaintiff had obtained possession of the property. It was her duty to be diligent in securing a judgment for possession if she was entitled to it. In a replevin suit, where the plaintiff has obtained possession of the property, the court is justified in requiring prompt obedience to its orders, made for the purpose of securing a speedy trial. The substituted petition should have been filed in this case by the 23d of May, 1877. It was not filed on the 29th day of October. On that day the defendants moved for judgment. We think that the plaintiff's long delay in complying with the order of court was equivalent to an abandonment of the case.

III. The court rendered judgment against one Seeley as surety upon the replevin bond. It appears that Seeley signed the substituted replevin bond which was stricken from the files. He was not, we think, liable upon that bond. The defendants claim in argument that he was surety upon the original bond. The record does not show such fact, nor what

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evidence the court acted upon in rendering the judgment, but the abstract does not purport to contain the evidence, and error is not to be presumed.

AFFIRMED.

50	142
80	695
50	112
96	733
50	142
110	576

THE KEYSTONE MANUFACTURING CO. ET AL. V. JOHNSON ET AL.

1. **Evidence:** FRAUDULENT SALE. The declarations of the seller of personal property, made after the sale and after he has parted with possession, are not admissible as evidence against the purchaser. The fact that an alleged sale was never in fact made cannot be established by the subsequent statements of the vendor that he is the owner of the property.

Appeal from Lucas District Court.

WEDNESDAY, DECEMBER 11.

THE defendant J. T. Johnson and one Soper were partners in the hardware and grocery business, at Chariton, Iowa, under the firm name of Soper & Johnson. On the 21st day of August, 1877, Soper sold to Johnson his interest in the partnership. By the contract of sale Johnson agreed to pay the partnership debts. This action was commenced August 28, 1877, by the plaintiffs, who are creditors of Soper & Johnson, and the stock of goods was attached as the property of Johnson. S. C. Hawn intervened in the action, and claimed he purchased the goods of Johnson on the 23d day of August, 1877. Soper joined with the creditors as plaintiff in the action. The plaintiffs replied to Hawn's petition of intervention, claiming that the alleged sale was made with intent to defraud the creditors of Soper & Johnson, and that Hawn participated therein.

Johnson answered the petition of plaintiffs, admitting the indebtedness to them, and admitting as between himself and Soper he only was liable to pay the partnership debts.

There was a trial by jury upon the issue as to the fraudu-

The Keystone Manufacturing Co. v. Johnson.

lent character of the sale by Johnson to Hawn. There was a verdict and judgment in favor of the latter. The plaintiffs appeal.

J. N. McClanahan, Thorpe & Sons and Wright, Gatch & Wright, for appellants.

Stuart Bros. & Bartholomew and Mitchell & Pennick, for appellees.

SEEVERS, J.—I. We are asked by appellants to reverse this judgment because the verdict is not supported by the evidence. Much of the argument of counsel is devoted to a discussion of this question. A careful examination of the record satisfies us that under the rule so often announced we cannot disturb the judgment on this ground. A discussion of the evidence would serve no useful purpose, and would unnecessarily encumber the reports.

II. The purchase of the goods by Hawn from Johnson was made on the 23d day of August. On the night of the 24th

1. EVIDENCE: Johnson left Chariton for Malvern, in Mills county, where he arrived on the next morning. The plaintiffs offered in evidence the depositions of witnesses who testified that at Malvern, and afterward at Glenwood, Johnson represented he was then the owner of a stock of goods at Chariton which he was desirous of removing to some new location. Said witnesses also testified to other admissions and declarations of Johnson which tended to impeach the good faith of the sale to Hawn. Upon objection being made the evidence was rejected. It is now insisted the testimony should have been admitted against Hawn, and as tending to prove that he participated in the fraudulent sale. It will be observed the proposed evidence did not constitute a part of the *res gestæ*, but the declarations of Johnson sought to be introduced in evidence were made after the completion of the alleged sale to Hawn. The declarations of the seller of personal property made after the sale and after he has parted with the posses-

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session are not admissible as evidence against the purchaser. *Sprague & Cary v. Kneeland*, 12 Wend., 161; *Bates v. Ableman*, 13 Wis., 721; *Baget v. Phelps*, 14 Wis., 103; *Ford v. Williams*, 13 N. Y., 582; *Kieth v. Kern*, 17 Ind., 284.

Such testimony is not competent to prove a conspiracy or fraudulent combination between Johnson and Hawn. The declarations of a co-conspirator, to be admissible against one engaged in the unlawful enterprise, must have been made while the parties were engaged in the unlawful undertaking. If made after the commission of the act they are but narratives of past occurrences, and affect no one but the party making them. 1 Greenleaf on Evidence, § 111. In *Ross v. Hayne*, 3 G. Greene, 211, the declarations were made while the party was in possession of the property, and were, therefore, made in disparagement of his own title. Such declarations, it is said, are admissible as original evidence. 1 Greenleaf on Evidence, § 109. Johnson was only nominally a party to the record, and he tendered no issue as to the question of fraud. His declarations were not, therefore, admissible because he was a party to the action. 1 Greenleaf on Evidence, § 172.

In *Hurley v. Osler*, 44 Iowa, 642, the only point decided was that the declarations of a grantor of real property, made while both the title and possession were in him, were admissible against one who it was claimed was his fraudulent grantee. Such ruling comes within the rule above stated as to disparagement of one's title. What is said in that case as to the admissibility of such declarations has reference to the grantor only, and whether they were admissible for the purpose of proving a fraudulent intent on his part was not in the case, nor is it presented in the case at bar. It must, therefore, be regarded as undetermined.

III. It is lastly urged the instructions are too general and not sufficiently specific. That they are mostly abstract propositions of law, briefly stated, is true; but that they are erroneous we are unable to say. In view of the fact that they correctly though briefly state the law governing the question of fraud,

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we are not prepared to say that there was prejudice; nor do we believe, in view of what was given, the court erred in refusing to give the first instruction asked by plaintiff.

AFFIRMED.

THE STATE V. MIZNER.

1. **Schools: PUNISHMENT OF PUPILS.** In the absence of proof to the contrary the law will presume that a teacher punishes a pupil for a reasonable cause, and in a moderate and reasonable manner; but this presumption may be rebutted by proof.
2. ———: ———. The punishment of the pupil must be for some specific offense which the pupil has committed, and which he knows he is being punished for.
3. ———: ———: **AUTHORITY OF TEACHERS.** The teacher is not authorized to punish a pupil for refusing to do something the parent has requested that the pupil be excused from doing. The teacher may be justified in refusing to permit the attendance of a pupil whose parent will not consent that he shall obey the rules of the school.

Appeal from Allamakee District Court.

WEDNESDAY, DECEMBER 11.

AN information was filed before a justice of the peace charging the defendant with the crime of assault and battery. He was convicted, and appealed to the District Court, where he was again convicted, and now appeals to this court.

J. B. B. Baker, A. M. May and F. M. Goodykoontz, for appellant.

J. F. McJunkin, Attorney General, for the State.

SEEVERS, J.—This cause was before the court at a former term, and is reported in 45 Iowa, 248. At the time of the alleged assault the defendant was a teacher of a public school, and the prosecuting witness, Ada Buemer, a pupil therein. She was a month or more over the age of twenty-one years at the time. She resided with her father, and constituted a

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part of his family. Her father wrote the defendant as follows: "Please excuse Ada afternoons, as her health will not permit her to attend all the time;" and again: "Please excuse Ada from the algebra class, she having more lessons than she can well attend to."

The testimony on the part of the State tended to show the foregoing writings were given to the defendant a few days previous to the assault. The prosecuting witness testified that when she handed one of them to the defendant he asked if she had written it. She replied her father had, and he so testified. The evidence tended to show the defendant declined to excuse her from the algebra class, and she testified she attempted to tell defendant her health would not permit her to take that study, but he interrupted her and said: "I don't want any words from you; I am talking now," and "told me to take my seat and come prepared with the lesson next time. I told him I could not study without help. He said: 'You can get help, and if you give me any more of your sass I will call you back here.'" She replied: "I don't want any more of your impertinence, Mr. Mizner." To which he replied: "That's enough now; that will do." This occurred on Monday. On the next day, Tuesday, the alleged assault and battery were committed.

When school was called that day the defendant asked the prosecutrix to come forward, and she went to where he stood, and the following, according to her testimony, occurred: "He said to me: 'Your excuse?' I said: 'Surely, I was here this morning before school called.' He said: 'Yes, but yesterday afternoon?' I said: 'I have brought an excuse for afternoons.' He said: 'You will fetch an excuse.' I said: 'Don't you remember I brought you an excuse from father excusing me from afternoons this winter.' He said: 'None of your sass, or I will take the hickory to you.' I said: 'Don't strike me.' My reason for making that remark was that he reached for the whip as he spoke. The whip was about six feet long, and was about a half an inch in diameter

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at the largest end. He broke a piece off that end, * * and whipped me with the top part. * * It was not more than four feet long. * * Think he struck me a dozen times * * over my shoulder. * * I felt the blows. * * They produced marks that stayed there two months. * * Think the whip broke to pieces. * * He raised on his tip-toes every time he struck. * * I went to my seat and got my cloak. He said: 'Do you understand me now?' I said: 'No, sir, I do not understand you.' * * I made this remark because I did not know what he whipped me for."

There was other testimony on the part of the State which tended to sustain the prosecutrix.

The testimony on the part of the defendant tended to show that when the algebra class was called, on Monday, the prosecutrix did not come forward, and the defendant said: "Miss Beumer, your class is called." She said she thought she was excused from algebra. He told her she was not; to come to the class. She did so, but took a book in her hand, and said she did not have her lesson. He told her to pay attention to the recitation. She opened the book in her hand. He told her to close it, which she did. She opened it again, and turned partly in her seat and commenced turning the leaves. He told her to close the book and keep still, as he did not want to speak to her again. After the recitation closed there was some conversation between them as to the algebra, about the close of which she told the defendant she did not want any more of his impertinence; to which he replied: "That will do, Miss Beumer; take your seat." She then said: "Yes, that will do."

On Tuesday the witnesses for the defense stated what occurred substantially as those on the part of the State, except that after some talk about the "excuse" the defendant said: "If you don't stop your sass I'll whip you." She replied: "Just try that; you don't dare to strike me. If you do it will be the dearest whipping you ever gave any one; you will pay for it."

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The evidence on the part of the defendant also tended to show there were no marks on the person of the prosecutrix, and that the whipping was not immoderate.

Such being the substantial facts there remains for determination the correctness of the instructions of the court, among which was the following:

I. "7. In the absence of all proof the law presumes that a father or school teacher punishes a child of the father or the pupil of the teacher for a reasonable cause and in a moderate and reasonable manner. But this presumption, like all other legal presumptions, may be rebutted by the proof."

It is urged this instruction is erroneous, for the reason the teacher is not liable because of the punishment inflicted, but only in the event that it was excessive, and that the evidence fails to show such was the case.

Forty years ago it was held that "when the correction administered is not in itself immoderate, and, therefore, beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the *quo animo* with which it is administered. Within the sphere of his authority the master is the judge when correction is required, and of the degree of correction; and, like all others entrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose." *State v. Pendergrass*, 2 Dev. & Batt., 365.

Twenty years later an instruction was refused which announced the rule that a teacher was not amenable criminally unless he inflicted the punishment with a bad intent, from vindictive feelings, and an instruction given which recognized the right to chastise a scholar by whipping, and the proof was sufficient to justify the instrument used as being a proper one, but that in "inflicting corporal punishment a teacher must exercise reasonable judgment and discretion as to the mode and severity of the punishment, by the nature of the

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offense, and by the age, size and apparent powers of endurance of the pupil."

As to this instruction it was said: "The instructions given tended to justify the defendant in punishing his pupils with greater severity than is consistent with a just and humane exercise of the authority conferred on him by law. To say the least, they were sufficiently favorable to the defendant." *Commonwealth v. Randall*, 4 Gray, 36.

We concur with the Supreme Court of Massachusetts in the case last cited, and further than this we have no occasion to go in the present case. But, if the rule of the first case cited is the correct one, then we have no hesitation in saying there was no error in the instructions of the court, because the punishment was immoderate and excessive, if the testimony of the witnesses for the State is true, and this was a question for the jury. Any punishment with a rod which leaves marks or welts on the person of the pupil for two months afterward, or much less time, is immoderate and excessive, and the court would have been justified in so instructing the jury.

II. The jury were further instructed: "3. The legal objects and purposes of punishment in school are like the object 2. —: —: and purposes of the State in punishing the citizen. They are threefold: *First*, the reformation and the highest good of the pupil; *second*, the enforcement and maintenance of correct discipline in school; and, *third*, as an example to like evil-doers. And in no case can the punishment be justifiable unless it is inflicted for some definite offense or offenses which the pupil has committed, and the pupil is given to understand what he or she is being punished for. And if you find from the evidence that the punishment in this case was inflicted upon the prosecutrix without her knowing what she was being punished for, then the punishment was wrongful on the part of the defendant. Punishment inflicted when the reason of it is unknown to the punished is subversive, and not promotive, of the true objects of punishment, and cannot be justified."

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The portion of the foregoing objected to is that which declares the punishment must be for some specific offense which the pupil has committed and is given to understand he or she is being punished for.

The object of all punishment must be to accomplish the purposes specified in the instruction. The definition is an admirable one, and cannot, we think, be improved. If the pupil does not know why the punishment was inflicted reformation cannot be expected therefrom. Just the contrary result might be expected. Counsel mistake the meaning of the instruction. It does not require the teacher to state to the pupil in clear and distinct terms the offense for which he or she is punished. It only requires that the pupil, as a reasonable being, should understand from what occurred for what the punishment is inflicted. There was evidence on which this portion of the instruction could well be based, and all else was for the jury.

Counsel, in their argument, say the punishment was not inflicted because of the prosecutrix's "failure to pursue algebra," or "for not attending afternoon sessions of school," but for insolent and contemptuous conduct. Were it not for this admission we should have been at great loss to determine for what offense the prosecutrix was punished. The particular difficulty which ended in the whipping was in relation to her absence the afternoon previous. The argument is that she was impudent on that occasion; but the evidence on the part of the State shows otherwise, and the most that can be said is that the evidence is conflicting. The question was, therefore, one for the jury to determine. During both Monday and Tuesday, according to all the evidence, there was language used by the defendant which was unjustifiable, and which tended to show that he permitted himself to get into a passion, which, to say the least, is not commendable; nor can we say that the conduct of the prosecutrix was just what it should have been. Notably was this so on Monday; but there

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is no pretense that she was punished on Tuesday for insolent conduct on the day previous.

III. The fifth instruction was as follows :

“5. If you find from the evidence that the prosecutrix was in feeble health, and was unable to pursue algebra studies with her other studies, and on account of such feeble health was unable to attend regularly the afternoon sessions of the school; and you further find that for that cause she was excused by her father from the study of algebra and from afternoon sessions of the school; and you further find that defendant had been informed of such facts; then you are instructed as a matter of law that he had not the lawful right to chastise the prosecutrix for failure on her part to pursue such studies, or to attend the afternoon sessions of the school.”

It is said there was no evidence showing that the health of the prosecutrix would not permit her to study algebra. If by this is meant there was no positive and direct evidence that such was the case we agree with counsel; but there was evidence so tending. Her father thought so, and she herself so claimed. This may, for aught we know, have been a sham; but as there was evidence on the subject it was for the jury to inquire as to its truth. But if, as is conceded by counsel, the prosecutrix was not whipped for failure to attend school in the afternoons, or to study algebra, then, even if it be conceded the instruction is erroneous, it cannot be said to be prejudicial. It was not prejudicial for another reason, which will be presently noticed.

IV. A portion of the sixth instruction is as follows: “The counsel for the defendant admits before you and the court, in a. — : — : argument, that the father may lawfully excuse his ^{authority of} _{teacher.} minor child from a particular study in the school if for any reasonable cause the father may believe the good of such minor so requires;” and the instruction proceeds to lay down the rule that the father of the prosecutrix might

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under the circumstances do so in the present case, although she was not a minor.

Counsel complain of the portion of the instruction which is quoted; but if counsel did so state in argument, or concede before the court, we see no objection to the attention of the jury being called thereto. That counsel did so concede must be conclusively presumed, in the absence of any showing to the contrary. If the father may excuse his minor child from a study, or during afternoons, we do not see why he might not the prosecutrix under the circumstances. But if the conceded proposition be true then either the father could do so or the adult pupil could excuse herself.

Now it is shown that both the pupil and her father desired this. If, therefore, the rules adopted by the teacher required that the prosecutrix should study algebra, and be in attendance during afternoons, and that proper discipline and the good of the school, as a whole, required an enforcement of the rules, we are constrained to think the mode adopted was not the proper one. Compulsory education is not yet the rule in this State, and instead of whipping the prosecutrix for failure to attend or study algebra, when both she and her father desired she should be excused, we think the defendant should have plainly said to both the prosecutrix and her father that she could not attend the school unless she was prepared to obey the rules in this respect. If a pupil attends school it must be presumed he submits himself to the rules; but that is not this case. Until compulsory education is established we are unwilling to sanction the rule that a teacher may punish a pupil, as in this case, for not doing something the parent has requested the pupil to be excused from doing. The remedy in such case is not corporal punishment, but expulsion.

There is nothing else that demands attention. The instructions refused, so far as they contained the law, were given or properly refused because not the law.

AFFIRMED.

The State v. McGuire.

THE STATE v. MCGUIRE.

- 1. Criminal Law: EVIDENCE.** The admissions of one accused of the crime of adultery with defendant were *held* not to be competent evidence against him.

Appeal from Buchanan District Court.

WEDNESDAY, DECEMBER 11.

THE indictment charged that the defendant, being a married man, had carnal knowledge of and sexual intercourse with Margaret D. Maloney, and was, therefore, guilty of the crime of adultery. Having been convicted the defendant appeals.

D. D. Holdridge, for appellant.

J. F. McJunkin, Attorney General, for the State.

SEEVERS, J.—I. The admissions of Mrs. Maloney were admitted in evidence, against the objection of the defendant. Such admissions were to the effect that she and the defendant were married. Such evidence must have been prejudicial to the defendant, and was inadmissible for any purpose.

II. The State claimed that the defendant wrote a letter after his arrest, and while he was in jail, to Mrs. Maloney, which had been lost or destroyed; and, in reference thereto, the State was permitted to prove that it was signed, "Your husband, John McGuire." There was no evidence the letter was written or signed by the defendant. Such evidence was, therefore, clearly inadmissible.

III. The court gave the jury the following instruction:

"8. Mrs. Maloney, the joint defendant indicted with McGuire, is an admissible witness. Her admissions or confessions may be used in evidence against him, if connected with some act of confession of her own in the nature of a joint acknowledgment; but her confessions or

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LAW: EVIDENCE.**

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acknowledgments, independent and alone, relating exclusively to herself and not joint acknowledgments of McGuire and herself, are inadmissible."

There is no evidence contained in the abstract tending to show that Mrs. Maloney had been indicted, either separately or jointly, with the defendant. We infer, therefore, that the statement in the instruction to that effect was inadvertently made. Whether it was prejudicial may admit of doubt. If we understand the residue of the instruction, it is to the effect that the admission or confession of Mrs. Maloney that she and the defendant were guilty of the crime charged could be considered by the jury in determining the question whether the defendant was or was not guilty. This, we think, was prejudicial error. There is no principle of law which will sustain such rule. The defendant was not bound by anything Mrs. Maloney should admit. She, it may be conceded, was a competent witness for the State. Whatever she, as such, might say, would be evidence for the consideration of the jury. But what she admitted, when not on the stand as a witness, would not be admissible or entitled to consideration by the jury.

Other errors have been discussed by counsel, but, as they will not probably occur on another trial, they have not been specifically alluded to.

REVERSED.

Gibson v. Abbott.

GIBSON V. ABBOTT ET AL.

1. **Venue: CHANGE OF: APPLICATION FOR.** An application for a change of venue, grounded upon the prejudice of the people of the county, cannot be made in vacation before the issues are made up.

Appeal from Johnson District Court.

WEDNESDAY, DECEMBER 11.

ACTION to recover for personal injuries inflicted by defendants. The plaintiff made application in vacation for a change of venue, on account of the prejudice of the inhabitants of the county against him, which was overruled. From this order he appeals. Further facts of the case appear in the opinion.

*Templin & Smith, for appellant.**Slater & Ewing, for appellees.*

BECK, J.—The application for the change of venue was denied by the judge on the ground that the issues of the case had not been made up. The correctness of this ruling is the only question presented for our decision in this case.

1. **VENUE:**
change of:
applica-
tion for.

Code, § 2591, contains this provision: "The application for a change of place of trial may be made either to the court or to the judge in vacation, and if made in term time shall not be awarded until issue be made up, unless objection be made to the court."

The language of this provision requires an issue to be made up only in the case of application being made during term time. It must be confessed that the same reason exists for having the case at issue when the application is made in vacation as when it is made to the court. But it was not suf-

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ficient in the minds of the legislators to require the provision to be extended to both cases.

Chapter 118, Acts Seventeenth General Assembly, amends Code, § 2590, so that a change of venue, when the objection of the applicant is to the inhabitants of the county, shall not be allowed "when the issue in the case can only be tried to the court." This act requires the judge or court passing upon an application for a change of venue to determine whether "the issue can only be tried to the court." How can there be a determination of this question before the issue is made up? Clearly there cannot be. The provision, then, cannot be enforced until issue is joined, for the condition contemplated by it cannot be known to exist or to be absent. This statute clearly contemplates that an issue shall be made up before an application, grounded upon prejudice of the people of the county, shall be passed upon by the court or judge in vacation.

But it may be said that the issue involved in this case, which is to recover for personal injuries, could not be tried to the court. This is highly probable, but not absolutely certain. It is possible that defendants might admit the averments of the petition, and set up some equitable defense to recovery. Certain it is the court or judge, acting upon the application for the change of venue in this case, could not discharge the duty imposed by the statute last cited, namely, determine whether the issue in the case was triable to the court or to a jury, until the issue had been joined.

We think the decision of the court below is correct.

AFFIRMED.

The State v. Hudson.

THE STATE v. HUDSON.

1. **Criminal Law: PRACTICE.** Where several parties have been jointly indicted, and they demand separate trials, the order in which they shall be tried may be determined by the district attorney, under the direction of the court.
2. ——— : **EVIDENCE.** Testimony tending to show that defendant, who was indicted as an accessory, furnished money to aid his co-defendant, who had admitted his guilt, to escape, was properly admitted.
3. ——— : ———. After a witness testified that defendant, after being held to answer, told him he would like to settle the difficulty, it was not error to permit him to testify further that defendant "looked as if he felt badly."
4. ——— : ——— : **PRACTICE.** The order in which evidence shall be introduced rests, under the direction of the court, within the discretion of the party introducing it.
5. ——— : ———. The acts and declarations of one who has been shown to have been engaged with defendant in prosecuting the common design are admissible in evidence against him.

Appeal from Floyd District Court.

WEDNESDAY, DECEMBER 11.

THE defendant, C. W. Hudson, was jointly indicted with Frank L. Bailey and L. C. Hickock, for the larceny of forty-five bushels of wheat from the granary of one William Hickman. The indicted parties pleaded not guilty, and demanded separate trials. The District Attorney elected to first try the defendant C. W. Hudson. He was tried, convicted, and sentenced to the penitentiary for one year. He appeals.

Starr, Patterson & Harrison, for appellant.

J. F. McJunkin, Attorney General, for the State.

DAY, J.—I. When separate trials were ordered the defendant Hudson demanded that the other defendants, Bailey and Hickock, be tried first, upon the ground, as shown by the minutes of the testimony taken before the grand jury, that the other defendants admitted

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law: practice.

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their guilt; that they were the only persons present at and taking an active part in the commission of the crime; and that their evidence is necessary to prove the defendant guilty. The defendant insists that he had a right to have his co-defendants first tried, in order that the fact that they were accomplices might be determined by the judgment of the court, and not left to be established by evidence on the trial of defendant. We think the order of trial in such cases must be left to the discretion of the District Attorney, under the direction of the court. The defendant sustained no possible prejudice by being first placed upon trial. The other defendants, Bailey and Hickock, admitted in their testimony, in the most unequivocal manner, their connection with the crime, and the court instructed that they were criminals upon their own admission, and that upon their testimony, uncorroborated, no conviction could be had. They were just as fully discredited as witnesses as if they had been already convicted of the crime charged. •

II. The evidence showed that the defendant Hudson was not present at the time the larceny was committed. If he had
2. ———: evl- any connection with the offense it was as an ac-
dence. cessary. The defendant Hickock testified that Hudson suggested and urged the commission of the crime, furnished facilities for its perpetration, and was to participate in its fruits. On Tuesday, the 22d day of February, C. B. Hickock, the brother of the defendant H. C. Hickock, and the defendant Hudson went to Clarksville and returned on Friday. On Wednesday, while they were away, the wheat was stolen. C. B. Hickock testified that he had a talk with Hudson about the matter after they returned, after the arrest of Bailey and before the arrest of H. C. Hickock. The witness was then asked whether or not Hudson gave witness any money to give to H. C. Hickock. The question was objected to as immaterial and irrelevant. Upon the suggestion of the District Attorney that he proposed to follow the testimony with evidence showing the purpose for which the money was given,

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the objection was overruled and the defendant excepted. The witness then answered: "He gave me some money to give to his (Clay Hickock's) wife. I don't know how much; I never looked at it." This action is assigned as error. In another part of his evidence this witness testified: "He gave me some money and told me to give it to Clay's wife. I didn't undo it, but I think from the corner there were two one-dollar bills and some change. I took it and carried it to Clay's wife. I think he said it was all the money he had."

Mary Hickock testified as follows: "Hudson, wife and me took supper together. Hudson said to Chet Hickock and me, then, if we saw Clay to send him to him. He said he would get money for Hickock, but it wouldn't do to borrow money, and he hadn't got any money—hadn't got much money. He said they wouldn't catch Mr. Hickock if he could see him and give him some money. He said he would get the money, and if we saw him to send it to him—get some money soon as he could." The defendant H. C. Hickock testified that after he and Bailey waived examination he and defendant walked home together, and the following conversation occurred: "I says to him, 'We have got into it, and the best thing is to get out of it.' He said, 'Yes, I will do all I can.' I told him if I had the money I should have gone away. He said he could not get the money without being suspicious, any more than what he did send. He sent me two dollars and forty-five cents. He gave it to my brother. My wife gave it to me." If the money was furnished to assist the defendant Hickock in getting away, evidence of the fact would not be immaterial or irrelevant. From the testimony subsequently admitted the jury might, at least, find that the money was furnished for that purpose. We think there was no error in the admission of this evidence.

III. The witness, C. B. Hickock, was asked this question: "State whether or not Hudson told you, in words or in substance, that they were after Clay, or that he knew they were after Clay." The witness answered as follows: "Yes, sir;

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he knew they were after him. So did I." The defendant moved to strike out the answer that Hudson knew they were after Clay. The motion was overruled. Defendant excepted. This action is assigned as error. It must be evident that the witness may have known, in various ways, that Hudson knew that persons were after his co-defendant Hickock. If the witness knew this fact we see no objection to his testifying to it. His means of knowledge are subject to test upon cross-examination, and if that should disclose that he had no knowledge upon the subject, or was merely expressing an opinion, the evidence, of course, would be entitled to no consideration.

IV. This same witness testified as follows: "I talked with Hudson coming from Rockford, after he was arrested and held to answer on Monday. * * * * We talked
3. —: —. mostly about settling it up if it could be settled. Hudson said he would like to have it settled, and would like to have me see Hickman; he could do nothing with Hickman." The witness was then asked: "Well, how did Mr. Hudson appear?" The defendant objected to the question as incompetent. The objection was overruled. The witness answered: "I don't know. He appeared as if he wanted to settle it up; wanted to fix it up if it could be fixed." The defendant moved to strike out the answer on the ground that it is an opinion of the witness. The court overruled the motion, and defendant excepted. The witness was further asked: "How did he look? How did he act that day?" The defendant objected on the ground that it is calling for the opinion of the witness, and is immaterial and irrelevant. The objection was overruled, and the witness answered: "Well, he looked as if he felt pretty bad." These rulings are assigned as error. There could have been no prejudice to the defendant in permitting the witness to state that he appeared as if he wanted to settle it up, after the witness had directly testified to the fact that defendant said he would like to have it settled, and wanted the witness to see Hickman. We think, also, that there could have been no prejudice to the defendant in

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permitting the witness to testify that defendant looked as if he felt pretty bad. This disposition disposes also of the seventh assignment of error.

V. L. S. How was introduced as a witness for the State, and testified to a conversation which he had with defendant at Marble Rock, in which he says the defendant stated that the first he heard about the stealing of the wheat was a few moments before, when Johnson told him down street. In cross-examination this witness was asked what relation he is to Bailey. This was objected to as immaterial, and the objection was sustained. This action is assigned as error. While the question might, without any impropriety or error, have been permitted to be answered, still we are not able to see that any prejudice could have been sustained by the defendant by the rejection of it.

VI. When H. C. Hickock was produced as a witness the defendant objected to his testimony on the ground that he is 4. —:—: jointly indicted as an accomplice in the act; that practice. there has been no showing made to the court that he is less guilty than the party on trial; that no order of court has been asked or made that he be received as a witness against the defendant; and that no evidence has yet been offered in the case tending to connect the defendant Hudson with the commission of the offense. The overruling of this objection is urged as error. Appellant relies upon *Ray v. Ray*, 1 G. Greene, 316. The doctrine of this case cannot now be regarded as the law in this State. Section 3636 of the Code provides that "every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared." As to the objection that no evidence had been introduced tending to connect the defendant with the commission of the offense, it is sufficient to say that a party, under the direction of the court, may select the order in which he will introduce his testimony.

VII. The defendant Hickock testified that, on the night of

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the larceny, he went to Hudson's with his wife, to do the chores, and stayed there all night. This witness 5. —: —. testified, without objection, as follows: "State whether you found any arrangements there at the house so you could go out and in still." "Yes, sir; Mrs. Hudson greased the door some at the time. She greased it with kerosene oil." "State whether anything was offered you to wear." "Yes, sir; she offered me some stockings. I told her I guessed I could wear my boots." "Who offered you the stockings?" "Mrs. Hudson. I think it was about nine or ten o'clock I went out. I found Bailey. He was out there. We then went out and got the wheat."

In the further progress of the examination of this witness he was asked: "What was said there, at the house of Mr. Hudson, that night you started to go out to do this work?" The defendant objected on the ground that the proposed evidence is immaterial, irrelevant and incompetent. The objection was overruled. The witness answered: "In the first place she wanted to know if I was going to do what I intended to do. That was before she offered me the stockings. I told her 'Yes.' She says, 'You want to be careful.' My woman speaks up and says, 'What are you going to do?' Mrs. Hudson told her there was a man out there going to take the wheat. I was going out to watch. My woman told me not to do it. I told her when I went out, I says, 'I won't.'"

From this testimony, which had before been introduced without objection, the jury might, at least, find that Mrs. Hudson was engaged with the defendants in the purpose of stealing the wheat, and that she was furthering, aiding and abetting the common design. If she was thus engaged her acts and declarations became, in contemplation of law, the acts and declarations of the defendant, and they are admissible in evidence against him. This view disposes, also, of the eleventh and twelfth assignments of error.

VIII. The defendant, upon cross-examination, asked of the witness H. C. Hickock a number of questions relating to

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the time of his marriage with his wife, Mary Hickock. The questions were excluded as incompetent, immaterial, and beyond cross-examination. It is claimed in argument that the purpose of this cross-examination was to show that, at the time the offense was committed, the defendant was living with the said Mary in a state of adultery, for the purpose of affecting his credibility as a witness. It is conceded that this purpose was not disclosed to the court; if it had been, probably the cross-examination would have been permitted. Without any explanation of the purpose and bearing of the proposed evidence, it appears to be beyond the proper scope of cross-examination. This view disposes, also, of the thirteenth error assigned.

IX. Several questions were excluded which were asked the witness Mrs. C. B. Hickock, tending to show her interest in and sympathy for her brother-in-law, the defendant H. C. Hickock. In the exercise of judicial discretion these questions might, without error, have been admitted; and yet we cannot say that, for the exclusion of them, the case should be reversed. The jury would hardly be authorized to conclude that the witness was prejudiced against the defendant on trial, from the fact that she was interested in and sympathized with his co-defendant. The proposed evidence would not have been sufficient to show that the witness was an accomplice in the commission of the crime. This disposes, also, of the sixteenth assignment of error.

X. Mrs. Hudson was introduced by the defendant, and asked the following question: "State whether you had any knowledge, or had ever heard at any time, that your husband had harnessed up his team, the Sunday night before, to take this wheat." Upon the objection of the State this question was excluded. Appellant insists that this interrogatory was proper for the purpose of showing that Mrs. Hudson was not a co-conspirator, and had no knowledge of any guilty acts of her husband, and to show absence of knowledge of a matter that the witnesses of the State swore she conversed about. The

 Brandirff v. Harrison County.

witness had before testified as follows: "Mr. Hudson was at home that Sunday before the wheat was stolen. I have no knowledge of my husband harnessing his team that evening, or having them harnessed, or anything of the kind. My husband never said anything to me about harnessing his team that evening, either then or since." The witness having once testified fully respecting the matter embraced in this interrogatory, there was no error in refusing to allow her to repeat it.

XI. The instructions asked by the defendant, so far as applicable and proper, are sufficiently embodied in the instructions given. The charge of the court is very full and fair, covering every phase of the case, and is, so far as we can discover from the argument presented by appellant, without error.

XII. The evidence is conflicting. There is not such a want of evidence to support the verdict as would warrant our disturbing it.

AFFIRMED.

50	164
79	592
79	635
50	164
88	342
50	164
93	745
50	164
111	380
50	164
123	676

 BRANDIRFF ET AL. V. HARRISON COUNTY ET AL.

1. **Taxation: ACTION TO RESTRAIN COLLECTION: PARTIES.** Where an alleged illegality in taxation extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented by one bill filed by all or any number thus interested, such joint bill may properly be filed.
2. ———: **ILLEGAL TAX: INJUNCTION.** Where a tax is illegal because there has been in no proper sense an assessment and levy, injunction is the proper remedy for the parties from whom it is sought to collect the tax.
3. ———: ———: **ESTOPPEL.** A county, having sought to levy the tax upon the land as plaintiffs', is estopped to afterward deny plaintiffs' title to the land in an action by the latter to restrain the collection of the tax.

Brandirff v. Harrison County.

Appeal from Harrison District Court.

WEDNESDAY, DECEMBER 11.

ACTION in equity to restrain the collection of certain taxes. The plaintiffs claim to be the owners in severalty of certain real estate in Harrison county, and that the tax books of said county for the year 1875 show that a certain special ditch tax was levied upon said lands. It is alleged that plaintiffs' lands were not benefited by said ditch, and that the digging thereof was not a public benefit, nor conducive to the health or public welfare of the citizens of the county; that no petition signed by any citizens asking the establishing of said ditch was at any time filed and presented to the board of supervisors; that plaintiffs were at no time served with a notice of the time and place where objections to the levy of said tax could be heard; and that, although residents of said county, they had no knowledge of such tax levy until long after it was made, and that they were thus deprived of the right to be heard and to appeal.

It is further averred that there was neither an assessment nor levy of said tax, and that if any levy was made it was verbal, and, therefore, void.

It is prayed that a writ of injunction may issue restraining the defendants from collecting said tax, and that upon a final hearing said injunction may be made perpetual.

The answer, in addition to a general denial, sets up—*First*, "that plaintiffs cannot maintain an action because there is a misjoinder of parties and causes of action, in that plaintiffs have no joint interest in the land in controversy, but own different and distinct portions of the same in severalty." *Second*, "that plaintiffs are estopped from maintaining this action in that objection should have been made before the completion of the ditch."

There was a hearing upon written evidence and a decree for the plaintiffs. Defendants appeal.

Brandirff v. Harrison County.

W. S. Shoemaker and Sapp, Lyman & Ament, for appellant.

Mickel & Davis, for appellee.

ROTHROCK, CH. J.—I. The first question to which our attention is directed is, can these parties plaintiff, being the owners in severalty of different portions of the real estate described in the petition, maintain this action? As applicable to the issues made in the pleadings, that there was no assessment nor levy of the tax, although there is some conflict of authority, we think the better rule is that such joinder of parties plaintiff may be made. In *Cooley on Taxation*, 545, 546, it is said: "But when the illegality extends to the whole assessment, or when it affects in the same manner a number of persons, so that the question involved can be presented without confusion by one bill filed by all or any number of those thus affected, there seems to be no sufficient reason why a joint bill should not be permitted. The reasons favoring it are that it avoids a multiplicity of suits, and the attendant trouble and expense; and the objection that the interests of complainants are several, is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue. Whereas, if the parties did not join, the same issue must be passed upon in separate suits brought by the several complainants. Although there has been some hesitation in sanctioning such bills the weight of authority is decidedly in favor of supporting them, and this method of redress is now most commonly resorted to when the case is appropriate for it."

Counsel for appellant cite *Rhoads v. Booth*, 14 Iowa, 575, and *Fleming v. Mershon*, 36 Id., 413, as being in principle opposed to such joinder of parties.

In the first-named case it was held that two or more persons could not maintain a joint action for malicious prosecution. It is evident that in such case each party must have a

Brandirff v. Harrison County.

different measure of relief in damages, and there can be no unity of interest in the recovery. Separate verdicts and judgments would be required. Here each one has the same interest, seeks the same object, which is the cancellation of an alleged illegal tax.

In *Powell v. Spalding*, 3 G. Greene, 443, it is said: "The sum of the doctrine is that, where there is unity in interest as to the object to be maintained by the bill, the parties seeking redress in chancery may join in the same complaint, and maintain their action together."

It was held in *Fleming v. Mershon* that where one person commenced an action in behalf of himself and numerous others, not named, to restrain the collection of a tax, and a motion to strike from the petition so much as sought to obtain relief for any other persons than the plaintiff was sustained, from which a number of persons by name other than the plaintiff appealed, that such appeal would not lie. Upon the other question in the case, as to the right of a party plaintiff to maintain such action for himself and numerous others not named, two members of the court concurred in holding that the action in that form would not lie, one expressed no opinion, and the other dissented.

We have not thought it necessary to discuss other authorities upon this question. They are in conflict, and we are content to adopt the conclusion reached in *Cooley on Taxation*, believing it to be the better rule.

II. It is urged that injunction will not lie to restrain the collection of this tax, because the plaintiffs have an adequate
2. ———: illegal remedy at law. To properly dispose of this point
tax: injunc-
tion. it is necessary that we should direct our attention to the pleadings and evidence, so far as they relate to that question.

It is alleged in the petition that there was no assessment nor levy of the tax. It appears from the evidence that at the September session, 1875, the board of supervisors made an order in these words:

Brandirff v. Harrison County.

"In the matter of the Stewart and Bryant ditch the board divided the land benefited by the same into three classes, and fixed the rate per cent as follows:

[Here follows the description of the land, divided into classes, with the rate per cent of the levy upon each class.]

"And the auditor is hereby instructed to levy the same in three equal annual assessments."

At the October session, in 1875, the following order or resolution was passed:

"On motion the assessments of benefits in matter of Stewart and Bryant ditch, as made at September session of this board, is hereby revoked and rescinded, and H. B. Lyman and H. B. Cox are appointed special commissioners to reassess the benefits and report to the auditor as soon as practicable."

Afterward Lyman and Cox filed, in vacation, a paper containing a list of the lands and a certain rate per cent. This paper had neither caption, certificate nor signatures. The board never afterward took any action in the matter. The auditor, without other authority, extended upon the tax books taxes against the land based upon the per centum contained in the paper filed by Cox and Lyman.

It will be observed that the allegation that no assessment and levy were made is fully supported by this evidence. When the action of the board at the September session, in assessing and levying the tax, was revoked and rescinded, if no further action had been taken the act of the auditor in extending the tax would have been wholly unauthorized.

The whole matter then stood just as though no assessment and levy had been made. What occurred afterward was in no sense an assessment and levy. It does not purport to be the action of the board. It is not a case of an irregular and informal assessment and levy. It is one where there is an entire absence of anything in the way of exercising the taxing power. Under these circumstances, where there was no exercise of the taxing power, what appears upon the tax

Brandirff v. Harrison County.

books as a tax is illegal and void, just as an execution would be void if there were no judgment upon which to base its issuance.

Upon the question whether an injunction is a proper proceeding in resistance of an illegal tax, there has been much discussion and contrariety of opinion, but in this State it has been fully settled.

In *Zorger v. The Township of Rapids*, 36 Iowa, 175, it is said: "We concede that in most cases where the interposition of a court of equity has been invoked to restrain the enforcement of an illegal tax, it has been refused upon the ground that the remedy at law is adequate. But the jurisdiction of equity for such a purpose has been too long recognized, and too frequently resorted to in this State, to be now made a matter of serious question."

There is a clear distinction between this class of cases and the cases of *Macklot v. The City of Davenport*, 17 Iowa, 379; *Patterson v. Baumer*, 43 Id., 477, and others, where it is held that injunction will not lie because of irregularities in exercising the taxing power. If the petition in this cause rested solely upon the ground that the lands of plaintiffs were not benefited by the ditch it would be but a mere irregularity, and should have been corrected upon appeal, or possibly by *certiorari*.

III. The plaintiffs were permitted to show, against the objection of defendants, that these lands were not benefited by said ditch. While this, in our opinion, was not proper grounds for the equitable interposition of the court, yet, we think, it was not objectionable to allow the plaintiffs to show that what appeared upon the tax books as a tax was inequitable and unjust.

IV. Finally, it is urged that the plaintiffs did not show by proper evidence that they were the owners of the land upon
3. —: —: which the tax was levied. They were permitted
estoppel. to state under oath that they were the owners, and were not required to produce record evidence of title. This,

 Gray & Stevenson v. Dunham.

we think, was sufficient. The question to be determined was the legality of the tax, and not one of title to land. The learned judge in the court below was correct when he said: "Defendants having charged this property as belonging to plaintiffs and listed it as theirs, and claimed to have assessed and levied a tax against it as their property, they are now estopped from denying plaintiffs' ownership, when they come in and seek to enjoin the collection of said taxes."

AFFIRMED.

GRAY & STEVENSON V. DUNHAM ET AL.

1. **Mechanic's Lien: MERGER.** Where a mechanic's lien, which misdescribed the property intended to be covered thereby, had been foreclosed, it was *held* that the lien did not become merged in the judgment so that another lien, correctly describing the property, might not be filed.
2. ———: ———. The mistake in the lien is not irremediable, and it will not prevent a party who has furnished materials from claiming a lien upon the property intended to be described.

Appeal from Guthrie District Court.

WEDNESDAY, DECEMBER 11.

THE plaintiffs filed their amended and substituted petition, alleging that on the 17th day of April, 1876, the plaintiffs made a parol contract with the defendant J. A. Dunham, to furnish lumber and material for a certain one and one-half story dwelling, situated on lot No. 4, in block No. 54, in the town of Stuart—the defendant, at the time, being the owner of said lot; that under and by virtue of said contract the plaintiffs furnished lumber and materials, as specified in exhibit "A," attached to the original petition, which lumber and materials were furnished for and used in the erection of said building; that on the 22d of December, 1877, the

Gray & Stevenson v. Dunham.

plaintiffs filed, in the office of the clerk of the District Court in and for Guthrie county, a just and true account of their demand, verified by affidavit, and claiming a mechanic's lien therefor, copies of which account and affidavit are appended to the original petition, marked "A" and "B;" that on the first day of the October Term, 1877, the plaintiffs obtained a judgment upon said claim against said defendants for the sum of two hundred and fifty-seven dollars and fifty-one cents, and twenty-six dollars attorney's fees, and, through mistake, foreclosed and established a mechanic's lien theretofore filed upon a dwelling-house (if any there be) situate on lot 4, block 52, Kenworthy's first addition to the town of Stuart; that said dwelling-house, a lien upon which is now sought to be established, is situated upon lot 4, block 54, in said town of Stuart.

The plaintiffs pray that the mechanic's lien so as aforesaid foreclosed and established be amended, set aside and vacated, and that their mechanic's lien upon the dwelling-house situate on lot 4, block 54, in said town of Stuart, be established and foreclosed, and the said dwelling-house be sold to satisfy the judgment heretofore recited as having been obtained by plaintiffs against the defendants at the October Term, 1877. This petition was filed March 20, 1878, the original petition having been filed on the 6th of the same month. The exhibits referred to in this petition are not set forth in the abstract.

The defendants demurred to this petition. The demurrer was overruled, and the defendants electing to stand upon their demurrer, a decree was entered as prayed, setting aside the foreclosure of a lien upon the lot described in block 52, and foreclosing the lien upon the corresponding lot in block 54. The defendants appeal.

E. R. Fogg, for appellants.

C. Haden and *J. L. Tait*, for appellees.

 Gray & Stevenson v. Dunham.

DAY, J.—I. The plaintiffs, as appears from the allegation of the petition, furnished material for the building of a house upon a lot in block 54 of the town of Stuart. <sup>1. MECHANIC'S
lien: merger.</sup> A mechanic's lien was filed in which, by mistake, the lot was described as situated in block 52. On the 1st day of October, 1877, the plaintiffs obtained judgment upon their claim for two hundred and fifty-seven dollars and fifty-one cents debt, and twenty-six dollars attorney's fees, and a foreclosure of their mechanic's lien upon a lot described as situated in block 52. Afterward, on the 22d day of December, 1877, the plaintiffs filed in the office of the clerk of the District Court a just and true account of their demand, verified by affidavit, claiming a mechanic's lien upon lot 4, in block 54, the lot upon which the materials furnished by plaintiffs were used. This action is brought to set aside the mechanic's lien established and foreclosed upon lot 4, in block 52, and to establish and foreclose the lien upon lot 4, in block 54.

1. The appellant claims that the account which plaintiffs held against the defendants was merged in the judgment of October 1, 1877, and that it cannot be made the basis of a claim for a mechanic's lien. It is doubtless true that the general rule is that, by a judgment at law or a decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. Its force and effect are then expended, and all remaining legal liability is transferred to the judgment or decree. *Wyman v. Cochran*, 35 Ill., 152. But the facts in this case are peculiar, and such as, we think, should take it out of the operation of the general rule.

A mistake was made in the description of the lot upon which the lien was claimed. It must be conceded that if this mistake had been discovered before judgment the judgment in its present form would not have been taken. There is no absolute rule of law or principle of equity which demands that, under these circumstances, the account should be treated

Gray & Stevenson v. Dunham.

as so finally and entirely merged in the judgment that it cannot furnish the basis of a claim for a mechanic's lien on the property for which the material was furnished. Such a holding would prefer shadow to substance, and would permit a mere technicality to triumph over broad and beneficent equitable principles. We are of opinion that, under the circumstances, the statement for a lien was properly filed, notwithstanding the judgment.

2. It is further claimed by appellants that the mistake in filing the claim for a lien is irremediable; that
2 —:— plaintiffs were bound at their peril properly to describe the property upon which the lien was claimed. In support of this view appellants cite *Lindly v. Cross*, 31 Ind., 106. This authority is not applicable. In that case the property on which the lien was claimed was described as lots "6 and 7" instead of "3 and 4." The plaintiffs, without attempting to file a lien upon the property for which the material was furnished, asked the court to correct the lien already filed, and establish it against lots 3 and 4. The court held that the lien is created by statute, and the court had no power to reform it. In this case, within the time allowed by law, a statement for a lien upon the property, correctly described, was filed. We know of no sufficient reason why a mistake in the description of the property upon which a lien is claimed should prevent a party from claiming a lien upon the property intended to be described.

II. It is claimed that the decree erroneously establishes a lien upon the property in question for the twenty-six dollars attorney's fee. The decree does not in direct terms establish a lien for this part of the judgment, but it does establish a lien for the judgment generally, without excluding the attorney's fee. The record does not disclose enough to enable us to determine how this attorney's fee became originally incorporated in the judgment. It cannot, we think, be made a lien upon the property in question. The decree will be so modified as to refuse a lien for this portion of the judgment.

 Smith v. Champney.

As this relief might have been obtained in the court below, if the attention of the court had been directed to it by motion, the modification will be made without cost to the appellees.

MODIFIED AND AFFIRMED.

50	174
78	225
50	174
93	489
50	174
98	636

 SMITH V. CHAMPNEY.

1. **Vendor and Vendee: CHANGE OF POSSESSION.** Where a person sells a field of corn standing upon his farm, and the vendee does not commence to harvest it, nor otherwise visibly to take charge of the corn or control of the field in which it stands, the actual possession is not changed, within the meaning of the statute providing that "no sale of personal property, where the vendor retains actual possession, is valid against existing creditors or purchasers without notice," unless the instrument evidencing the sale be recorded.

Appeal from Harrison District Court.

WEDNESDAY, DECEMBER 11.

ACTION to replevy twelve acres of corn standing upon the land of one Hunt. The defendant is a constable, and as such had levied an execution upon the corn to satisfy a judgment against Hunt. The plaintiff claims to be the owner by virtue of a purchase of the same from Hunt. The evidence shows that on the 1st day of October, 1877, the plaintiff entered into an oral agreement with Hunt whereby he was to cancel a small account due him from Hunt, pay a certain note due from Hunt, on which plaintiff was liable as surety, and in consideration thereof plaintiff was to become the owner of the corn in question, and Hunt was to harvest it and deliver it upon the plaintiff's premises the last of the month. On the second day of the month, and before the plaintiff had seen the corn, so far as the evidence shows, and before there had been any delivery or change of title or possession, except so far as shown by the facts above stated, the corn was seized by the

 Smith v. Champney.

defendant upon execution. There was a trial without a jury. The court found that the corn was delivered before the levy; that the plaintiff became the absolute and unqualified owner, and was entitled to recover. Judgment was accordingly rendered for the plaintiff, and the defendant appeals.

S. I. King, for appellant.

Evans & Roadifer, for appellee.

ADAMS, J.—Section 1923 of the Code provides that “no sale
 * * * of personal property, where the vendor * *
 1. VENDOR and * * retains actual possession, is valid against
 vendee: change
 of possession. existing creditors or subsequent purchasers with-
 out notice, unless a written instrument conveying the same is
 executed, acknowledged like conveyances of real estate, and
 filed for record.

To entitle the plaintiff to recover there must have been either an actual change of possession, or the levy must have been made with knowledge on the part of the defendant of the plaintiff's purchase. There was no finding as to notice, but there was a finding that the corn was delivered to the plaintiff. This finding is assigned as error. The word *delivery* varies in meaning somewhat according to the circumstances under which it is used. Benjamin on Sales, § 675. But the court must have used it in this case to denote actual change of possession, because anything less than that would, under the statute, be insufficient for the plaintiff's protection. We have only to inquire, then, what is meant by actual possession as those words are used in the statute. In determining their meaning it is obvious that we need not inquire what delivery or what change of possession is sufficient to pass title. Of course, if the title did not pass the plaintiff could not recover; but something more than title is necessary under the statute to protect a vendee against a creditor of the vendor. It is claimed by the plaintiff that Hunt did not retain “actual possession” within the meaning of the words as used in the stat-

Smith v. Champney.

ute, if all the delivery was made of which the property was susceptible at the time, and it is claimed that there was such delivery. On the other hand, it is claimed that Hunt did "retain actual possession," unless there was a change of such character that the defendant might and should have observed it. The plaintiff relies upon *Courtright v. Leonard*, 11 Iowa, 32; but in that case the delivery was held insufficient. That is all that was decided. It cannot constitute an authority for holding the delivery in this case sufficient.

[In our opinion, when a person sells a field of corn standing upon his farm, and the vendee does not commence to harvest it, nor otherwise visibly take charge of the corn or control of the field in which it stands, the actual possession is not changed within the meaning of the statute. The rules of construction require us to give force to the word *actual*. There is a clear implication that there might be a possession not actual, and that the transfer of such possession merely would be insufficient. Keeping in view this implication, and that the word *actual* must, if possible, be given some force of its own, we come to the conclusion that the possession contemplated is such that it is not changed by the mere words of the parties, but by something being done calculated to impart notice of the change.]

We are confirmed in this view by considering the object which the statute was manifestly designed to secure. The statute provides for a record of the sale where the vendor retains actual possession. If there is an actual change of possession it obviates the necessity of a record, and conversely. Now the object of a record is to impart notice. The change of possession which would make a record unnecessary should be such as to impart notice. Certainly no good reason can be given why a change of possession would obviate the necessity of a record, unless it was sufficient to impart notice.

At common law there has been a conflict in the decisions as to whether the want of visible change of possession should

The S. C. & St. P. R. Co. v. The County of Osceola.

be deemed conclusively fraudulent as against the creditors of the vendor, or merely a badge of fraud.

In *Weeks v. Weed*, 2 Aiken, 70; *Flanagan v. Wood*, 33 Vt., 337, it is held to be conclusive. But, whether the one rule or the other has been held, the possession in question has been the visible or apparent possession. The actual possession contemplated in our statute, we think, is the same. In this connection see *Lewis v. Swift*, 54 Ill., 436; *Hook v. Linderman*, 64 Pa. St., 499; *Miller v. Garman*, 69 Pa. St., 134. In our opinion the court below erred in holding the delivery in this case, as against the defendant, sufficient to entitle the plaintiff to recover.

REVERSED.

THE S. C. & ST. P. R. CO. V. THE COUNTY OF OSCEOLA.

1. **Public Lands: RAILROAD GRANT: TAXATION.** Chapter 34, Laws of 1874, authorizing the certification to the Sioux City & St. Paul Railroad Company of the lands held by the State in trust for that company, did not have the effect to pass the title until after the lands had been certified by the Governor, and they were not, therefore, taxable to the company until after such action by the executive.

Appeal from Osceola District Court.

WEDNESDAY, DECEMBER 11.

THIS is an equitable action to restrain the collection of taxes for the year 1875 upon lands of the plaintiff.

There was a decree in the court below declaring said taxes illegal and void. Defendant appeals.

Chase & Taylor, for appellant.

J. H. Swan, for appellee.

50	177
83	171
83	180
50	177
117	600

The S. C. & St. P. R. Co. v. The County of Osceola.

ROTHROCK, CH. J.—I. The lands upon which the taxes in controversy were levied were acquired by the plaintiff under certain acts of Congress and the Legislature of this State, being grants or donations of land to aid in the construction of a railroad. It is unnecessary to refer at length to the provisions of the act of Congress approved May 12, 1864, and to the acts of the Legislature of this State, in reference to said grant, prior to the act of March 13, 1874. In the case of *The S. C. & St. P. R. Co. v. The County of Osceola*, 43 Iowa, 318, in which it was held that these lands were not taxable for the year 1873, the effect and force of these various acts are fully discussed and determined.

1. PUBLIC
lands: rail-
road grant:
taxation.

The act of March 13, 1874, chapter 34 of Local Laws, is as follows:

“Section 1. *Be it enacted, etc.*, that the Governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City & St. Paul Railroad Company any and all lands which are now held by the State of Iowa in trust for the benefit of said railroad company, in accordance with the provisions of section 2, of chapter 144, of the Acts of the Eleventh General Assembly.”

Section 2, of chapter 144, of the Acts of the Eleventh General Assembly provided that “whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress (act of May 12, 1864), said lands shall be held by the State in trust for the benefit of the railroad company entitled to the same by virtue of said act of Congress, and be deeded to said railroad company as shall be ordered by the Legislature of the State of Iowa at its next regular session, or at any session thereafter.”

It appears from the record before us that the Governor did not certify the land upon which the taxes in controversy were levied until after the year 1875, because he and the register of the State land office were enjoined from so doing in an action instituted by the McGregor & Missouri River Railroad

The S. C. & St. P. R. Co. v. The County of Osceola.

Company, claiming title to said lands. In the case above cited, involving the validity of the taxes for 1873, we held that the plaintiff acquired no property in the lands which was subject to taxation prior to the act of March 13, 1874. It is there said that "whether after such action [of the Legislature] a patent was necessary to pass the title, or whether such legislation would have that effect without a patent, we need not inquire."

II. The single question, then, for our decision in this case is, was it necessary, in order that these lands should become the taxable lands of the railroad company, that the Governor should "certify" them to the company.

It will be observed that by the act of March 13, 1874, no title was conveyed. It provided that the lands held in trust by the State should be conveyed by the Governor certifying them to the railroad company. Until this was done the title remained in the State the same as it did before the passage of the act. The plaintiff was not invested with such an ownership as that it might with propriety proceed to sell and dispose of the lands as its own. Taxes for all purposes are imposed by authority of the State. It surely would be grossly unjust for the State, while holding these trust lands and preventing the company from using them and disposing of them as its own, to subject them to taxation. The State appointed the Governor its attorney in fact, so to speak, to make the conveyance, and until the power was exercised the plaintiff had no taxable interest in the land.

III. It is urged that the acts of the railroad company show that it did not desire the land to be certified, and that all its efforts in that direction were but a mere pretense to avoid taxation. We cannot so regard the evidence. The officers of the plaintiff repeatedly urged that the lands should be certified, notwithstanding the injunction, and we see nothing in the record indicating that they did not desire what they asked, nor that they were not acting in entire good faith.

AFFIRMED.

Trebon v. Zuraff.

TREBON V. ZURAFF ET AL.

1. **Practice in the Supreme Court: REPEAL OF STATUTE: TRIAL DE NOVO.**
The repeal of section 2742 of the Code, respecting trials *de novo*, pending the appeal of a case, does not entitle the appellant to a trial *de novo* if the case were tried below upon oral testimony.
2. ———: **PRESUMPTION.** Every presumption will be indulged in favor of the correctness of the rulings upon the trial, and a judgment will not be reversed for error in such rulings, if for any reason they can be sustained.
3. ———: **PARTIES.** Any objection based upon a failure to include a necessary party, first made on appeal, does not constitute good ground for a reversal of the judgment.

Appeal from Buchanan Circuit Court.

WEDNESDAY, DECEMBER 11.

ACTION in chancery. There was a decree granting the relief prayed for in plaintiff's petition. Defendants appeal.

Boies & Couch, for appellants.

E. E. Hasner, for appellee.

BECK, J.—I. The action is brought to set aside certain deeds executed by Michael Burk, conveying all his real and personal property to defendants Jennie Zuraff and her husband, in consideration of the support of himself and wife during their natural lives. The wife of the grantor joined in the conveyances. Plaintiff and defendant Jennie are their daughters. The petition charges that the deeds are void for the reason that the grantor, Michael Burk, was, on account of the want of memory and mind, not competent to make contracts, and undue influence was exerted over him by the defendants to induce him to execute the conveyances. The allegations of the petition were put in issue by the answer.

II. The case was tried upon oral testimony. It was not

Trebon v. Zuraff.

reduced to writing upon the order of the court, as required by Code, § 2742, to entitle the parties to a trial *de novo* here. The trial was before, and the appeal taken after, chapter 145, Acts Seventeenth General Assembly, took effect, which repeals the section just named. Defendants' counsel insist that, under this repealing act, the cause is triable *de novo* in this court; but this very point we have decided adversely to counsel's position at the present term. See *Simondson v. Simondson*, ante, 110. There is no reason for disturbing this decision; we must follow it.

III. Counsel assign several errors upon the record which we will proceed to notice, following the order of their discussion in the brief before us.

One witness, the widow of deceased, was asked if "he ever, before he signed the paper, expressed a desire to give the property to plaintiff;" and then was asked if she heard deceased "at any time say anything about giving his property to plaintiff." Objections to both questions were sustained, and the ruling of the court below is now made the grounds of objection to the judgment.

The abstract fails to show the grounds of objection in the court below, or the evidence defendants proposed to elicit by them. As we must exercise every presumption in favor of the court's rulings, we cannot reverse the judgment for the rulings upon these objections, if, for any reason, they could have been properly sustained. The questions are, by their language, not limited to a time when the deceased was not, or was not claimed to be, mentally incapable of making the deeds. They are, in fact, so broad that they cover the time when he was shown to be not of sound mind. One witness, his widow, had testified, just before the question was propounded to her, that deceased was sometimes out of his mind.

The questions, if limited to a time when deceased was not, or was charged not to be, of weak mind, would doubtless have been correct, and we will presume would have been so held by

1. PRACTICE
in the supreme
court: repeal
of statute: trial
de novo.

2. ———: pre-
sumption.

Trebon v. Zuraff.

the court below; but, in the broad language in which they are presented in the abstract, they cannot be regarded as proper under all aspects in which the case appeared to the court below.

IV. The widow of deceased was not made a party to the action. It is now insisted that this is a ground for reversal. It may be conceded that she was a proper party, and for the purpose of this case, without so deciding, that she was a necessary party. But no objection based upon this ground was made in any form in the court below. The record does not show that the point was suggested. The case being tried here upon errors, we can consider no objections not made in the court below; we can only pass upon questions decided in that court. As the question now before us was not raised in the circuit court, we cannot decide it.

It is no answer to this position to say that full relief cannot be granted to the parties unless the widow be joined in the action. If that be so, and they suffer thereby, they pay the penalty of their own negligence in the prosecution of the case. They alone will suffer; those not parties are not affected by the decree in the case. We cannot modify or disregard well-established rules to protect those who have neglected opportunities to protect themselves. No other questions arise in the case.

AFFIRMED.

WESTON & Co. v. DUNLAP ET AL.

1. **Mechanic's Lien :** SALE OF PROPERTY. Where the party entitled to a mechanic's lien fails to file the same until after the lapse of ninety days, during which time the property has passed to an innocent purchaser, he is not entitled to enforce his lien against such purchaser, and the rule is not varied by the fact that the vendee took the property under a bond for a deed, and made no actual payment, but simply executed his note for the purchase price.

Appeal from Davis Circuit Court.

THURSDAY, DECEMBER 12.

ACTION to enforce a mechanic's lien. The debt was contracted by the defendant Dunlap for materials furnished in the erection of a building upon the premises in question, which premises have since become the property of the defendant Moore. Judgment was taken against Dunlap by default. Moore defends against the lien. The last item in the plaintiff's account was furnished May 24, 1875. No statement for a lien was filed until November 11, 1875. In the meantime the property changed hands three times. Dunlap, at the time he erected the building, had purchased the premises of one Glenn, and had taken a bond for a deed. Afterward he made a trade with Glenn, whereby he surrendered his claim upon the property, and was released from all claim for purchase money. Glenn then sold the premises to one Cammack, who gave his note therefor and took a bond for a deed. Glenn transferred the note to the defendant Moore, and afterward Cammack conveyed his interest in the premises to Moore in payment of the note. At the time Cammack bought the premises and gave his note therefor he had no knowledge, actual or constructive, that the plaintiffs claimed a mechanic's lien upon the premises; but he acquired such knowledge before his sale and conveyance to Moore. The foregoing are the more important facts of the case. Some other facts

Weston & Co. v. Dunlap.

which are relied upon by the plaintiffs will be stated in the opinion. The court dismissed the plaintiffs' petition as against Moore, holding that he acquired the premises free from the lien. The plaintiffs appeal.

Traverse & Eichelberger, for appellants.

Trimble, Carruthers & Trimble, for appellees.

ADAMS, J.—The doing of work or the furnishing of materials is of itself constructive notice of the mechanic's lien for ninety
1. MECHANIC'S lien: sale of property. days after the last item of materials furnished or work done. After that, if the mechanic desires to give constructive notice, he must file a statement with the clerk of the District Court. If he neglects to do so, and in the meantime the premises are sold to a person who purchases in good faith, without notice, the lien is defeated. Code, § 2137. The only question in this case is as to whether Cammack's purchase was such as to defeat the lien. The plaintiffs deny that it was. They base their denial in the first place upon certain facts which remain to be stated. It appears that at the time Glenn sold the property to Cammack, and gave him a bond for a deed, Glenn himself was only the equitable owner of the property, the legal title being in one Findley. It also appears that Glenn had knowledge of the plaintiffs' lien. Now such being the fact the plaintiffs maintain that, although Cammack may have purchased without notice, still, as he purchased merely an equitable title, which was subject to the lien before the purchase, it must be held to be subject to it afterward. They cite *Chew v. Barnett*, 11 Serg. & Rawle, 389; *Dupont v. Wertheman*, 10 Cal., 354; *Goldsborough v. Turner*, 67 N. C., 403; *Boone v. Chiles*, 10 Peters, 177; *Vattier v. Hinde*, 7 Peters, 252.

In *Chew v. Barnett* the court, stating clearly the doctrine upon which the plaintiffs rely, said: "Every equitable title is incomplete on its face. It is, in truth, nothing more than a title to go into chancery to have the legal estate conveyed,

and, therefore, every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice of it or not." We need not stop to determine to what extent the doctrine of that case is supported by the general current of decisions. It is certainly subject to some qualifications, and with those qualifications the opinion from which we have quoted can hardly be adduced as authority in the case at bar. The purchaser of an equity without notice may protect himself against a prior equity by obtaining the legal title, even though he obtain it after notice of the prior equity. *Campbell v. Brackenridge*, 8 Blackf., 471; *Gibler v. Trimble*, 14 Ohio, 423; *Edmondson v. Hays*, 1 Overt. (Tenn.), 509; *White v. Dougherty*, Mart. & Y. (Tenn.), 309; *Brown v. Welch*, 18 Ill., 343.

The doctrine that the purchaser of an equity, though without notice, takes subject to a prior equity, is based upon the rule that he who is prior in time is prior in right. But it is a technical rule, and, inasmuch as the subsequent purchaser's conscience is not affected, he may obtain the legal title, and a court of equity will not divest him of it. Cammack acquired the legal title from Findley.

Besides, it appears to us that a proper construction of the statute would require us to hold that the plaintiffs' lien was divested at the time of Cammack's purchase from Glenn. The statute provides for notice of the lien by record. Where the lienholder fails to give such notice, and the property passes to an innocent purchaser, he should not be heard to complain if he is not permitted to assert his lien against such purchaser; and, generally, we think the true rule to be that where a person purchases an equitable title, without notice, he takes it, as he would a legal title, divested of all liens thereon of that character that constructive notice of them may be given by record. This rule was held in *Bellas v. McCarty*, 10 Watts, 13; *Flagg v. Mann*, 2 Sumner, 486.

But it is insisted by appellants that Cammack's purchase from Glenn did not divest the plaintiffs' lien, because he made no actual payment for the property. They cite *Kitteridge v.*

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Chapman, 36 Iowa, 348. In that case the court say: "An actual payment is in general necessary to the character of a subsequent *bona fide* purchaser for value, and giving a security or bond, or other obligation for payment, is not sufficient." But the court further say: "In holding that actual payment is generally necessary to the character of a purchaser for value, we do not mean to decide that when the purchaser has executed negotiable securities, which have been actually negotiated so as to render him liable thereon to the holder, he would not in such case be entitled to protection as a *bona fide* purchaser."

In *Partridge v. Chapman*, 81 Ill., 137, the purchaser had given his negotiable notes for a part of the purchase money, which had been negotiated. It was held that he was entitled to the same protection that he would have been if he had paid the whole purchase money in cash.

In the case at bar Cammack's note had been negotiated to Moore. While it appears that at the time this action was commenced, Moore had bought the premises of Cammack, and as the consideration thereof had surrendered to him the note, yet that circumstance is immaterial. If Cammack could not have protected himself with the note outstanding, provided the lien had then been enforced, then the lien could not have been enforced. So the only question is as to whether Cammack could have protected himself against the note if the lien had been enforced before he took it up. The appellants maintain that he could. Precisely how he could is not pointed out. They cite and rely upon *Kitteridge v. Chapman*. That is one of a line of authorities holding what may now be regarded as the settled doctrine of this country, that where a person purchases and takes a conveyance of real property without notice from a person who holds merely the legal title, and is not the owner of the property in equity, and the purchaser has paid but part of the purchase money, he shall not hold the property, but have a lien for the amount paid; and if he is in possession he cannot be divested of his title or pos-

session until reimbursed. In addition to the authorities cited in *Kitteridge v. Chapman*, see *Lewis v. Beatty*, 32 Miss., 52; *Pickett v. Barron*, 29 Barb., 505.

Such purchaser, then, may have his action to enforce his lien, or he may wait until the owner of the equitable title offers to reimburse him. But these cases are not applicable to the case at bar. The plaintiffs do not claim to be the owners of the property, but merely to have a lien upon it. The ownership, legal and equitable, became vested in Cammack and afterward passed to Moore. A court of equity would not have vested the plaintiffs with the title and right of possession even if they had tendered to Cammack the amount of his note, nor could Cammack have been required to treat himself as a paramount lienholder to the amount of the note. The principles involved in this case are entirely different from those involved in *Kitteridge v. Chapman*, and in the cases on which it is based. We have a case where a court is asked to enforce a lien against a purchaser without notice, and the ground of the application is that enough of the purchase money remains unpaid to discharge the lien.

If the purchase money were due to Glenn, the vendor, it is possible that an action in equity might be maintained against him and Cammack, and a decree rendered that of the purchase money enough should be paid by Cammack to the plaintiffs to discharge their claim. This would certainly appear to be so if the plaintiffs' claim were a claim against Glenn, and the plaintiffs had taken a mortgage from him upon the property before his sale to Cammack, and they had failed to record the mortgage, or if the plaintiffs' claim was for purchase money and they held a vendor's lien. In such case we think a court of equity would not only give the plaintiffs a decree for the purchase money due from Cammack to Glenn to the amount of their claim, but would subrogate them to the rights of Glenn still further, and allow them the benefit of his vendor's or other lien, if he held any. *Duphey v. Frenage*, 5 Stewart & Porter (Ala.), 215. If Glenn had no

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lien the plaintiffs could acquire none, for the case must proceed upon the theory that Cammack, being an innocent purchaser, cannot be placed in any worse position by the enforcement of the plaintiffs' equity. *Macomber v. Peck*, 39 Iowa, 351.

In the absence of a lien in favor of Glenn the plaintiffs could only have a decree that the purchase money, to the amount of their claim, should be paid to them instead of Glenn. But the plaintiffs are not seeking a decree to divert to themselves the payment of purchase money, nor are they seeking subrogation to Glenn's lien, if he ever had any. They are seeking simply to enforce what they claim as their own lien, and by an immediate execution sale of the property. If they had brought an action simply to divert to themselves what would otherwise be payable from Cammack to Glenn, and to obtain the benefit of Glenn's lien, the court would take notice of the terms of payment, as fixed by Cammack's contract, and render decree accordingly. Whatever time Cammack had stipulated for would, of course, have been given him. When the time expired payment to the plaintiffs would, under the decree, have operated *ipso facto* as a discharge to that extent of Cammack's obligation to Glenn. The enforcement of a mechanic's lien as such affords no such protection to an innocent purchaser of the premises.

According to the appellants' theory Cammack should have paid at his peril, taking his chances, not only in regard to the validity of the plaintiff's claim, but in regard to the amount due, and then have waited to be sued on his note, when he should have fought out his protection as best he could by plea of set-off, or failure of consideration, or something else. If the note had long to run (in this case it was said to be payable in three years from date) it is evident that it would not only be improper to require payment in advance of maturity, but improper to subject Cammack to the chances of his witnesses being dead or missing whom he might need in maintaining his defense. Besides, no innocent person should be put in a position of being obliged to wait until he is sued

The State v. Atherton.

upon a debt. It is the right of every debtor to pay his debt whenever his creditor will accept payment, and if he can pay better in property than in cash it is his right to pay in property. If garnished, or made defendant in an equitable action, as above described, his obligation may in that way be transferred; but still he may settle with the new creditor as he and the new creditor agree.

We are of the opinion that this kind of an action cannot be maintained against an innocent purchaser while his note for purchase money is outstanding. It could not, then, have been maintained against Cammack. The lien, then, was divested when the property passed to Cammack.

AFFIRMED.

THE STATE V. ATHERTON.

1. **Criminal Law: RAPE.** Upon the trial of one indicted for rape, an instruction directing the jury that they might find the defendant guilty if the woman failed to resist because she was imbecile was *held* to have been properly given, although the record contained no evidence tending to show imbecility.
2. ———: ———: **ASSAULT.** A person may be indicted for rape, and conviction for that offense fail by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with intent to commit rape.

Appeal from Harrison District Court.

THURSDAY, DECEMBER 12.

THE defendant was indicted for the crime of rape, and convicted of an assault with an intent to commit rape, and now appeals to this court.

Montgomery & Scott, for appellant.

J. F. McJunkin, Attorney General, for the State.

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93	93
50	189
96	476
50	189
104	12
50	189
118	500
50	189
122	84
50	189
129	483

The State v. Atherton.

ADAMS, J.—The defendant assigns as error the giving of an instruction which is in these words: “The general proposition of law is very distinct and broad that the will of the woman must oppose the act of intercourse with her, and that any inclination by her favoring the same is fatal to the prosecution; but if the female is weak in intellect and foolish, and so neglects to oppose the force because she has no intelligent will sufficient to direct her to resist, then the intercourse with her is rape. If, therefore, you find that the defendant Atherton laid hold of the witness, Sarah E. Harper, and had unlawful intercourse with her, and you further find that the witness Sarah was then weak in mind and intellect, and had no intelligent will to enable her to know and comprehend what was about to be done by the defendant, and to resist his acts at the time, then the act may be said to have been committed by force and against the will of said Sarah, and under such circumstances the defendant would be guilty as charged.”

The fact that the defendant had connection with the prosecuting witness is proven beyond dispute. She not only so testifies, but it is proven by the admissions of the defendant. It appears also that the act was witnessed by a person at no great distance from the parties, and this person was introduced by the defendant himself to prove that he witnessed it. The defendant's object in introducing this witness was to prove that the prosecutrix made no resistance, and the witness so testified. There were also circumstances shown tending to prove that whatever resistance, if any, the prosecutrix made must have been slight. She and the defendant were riding together in a wagon upon a public road, and the transaction took place in the wagon, she occupying a sitting position. Such being the evidence in regard to a want of resistance the State sought to convict on the ground that the prosecutrix was imbecile, and the instruction above quoted was given upon the theory that the jury might find that she was imbecile, and might convict notwithstanding it should appear to them that there was a want of resistance upon her part.

The State v. Atherton.

The record contains no evidence tending to show imbecility, nor does it contain any statement that such evidence was introduced. The record, however, does not purport to contain all the evidence, and in such case we will not assume, for the purpose of reversing, that there was no evidence upon which the instruction could be based. *McMillan v. The B. & M.-R. R. Co.*, 46 Iowa, 231. The instruction, indeed, is not objected to on the ground that there was no evidence tending to show imbecility, but on the ground that if imbecility was proven the defendant was not guilty of rape, and could be indicted and convicted only under section 3863 of the Code. We are inclined to think that if the prosecutrix was so destitute of mind that she was incapable of consent, the defendant was guilty of rape, and might be convicted independent of the section cited. 2 Bishop's Crim. Law (5th Ed.), § 1121.

Whether section 3863 of the Code is not intended to provide for the punishment of an offense distinct from that of rape, to-wit: the having carnal knowledge of a woman, not altogether by force, nor because she has no will, but because her will is overcome by reason of her imbecility, which prevents her from fully comprehending not the physical but the moral character of the act, may admit of some doubt; but we do not feel called upon to determine this question in this case. Under the instruction the jury must have found that the connection, which is undisputed, was had with the prosecutrix's intelligent consent. As this is what the defendant sought to show, we do not think that, so far as the instruction is concerned, he has any ground of complaint.

It only remains to be determined whether the jury, after having found that the prosecutrix consented to the connection, and that the defendant was, therefore, not
 2. —: —: assault. guilty of rape, could properly find that the defendant was guilty of an assault with an intent to commit rape. There is evidence tending to show that the defendant in the outset used some force, and that the prosecutrix made some resistance. Now the use of force, in an endeavor to have car-

 Alexander v. Sully.

nal knowledge of a woman, tends to show an intent to commit rape, and such intent may exist consistently with the fact of a subsequent consent. A person, then, may be indicted for rape, and if the conviction for that offense is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape. *State v. Cross*, 12 Iowa, 66.

AFFIRMED.

 ALEXANDER V. SULLY.

1. **Tax Sale:** TENANT IN COMMON. If a tenant in common is not in possession, and his title, therefore, does not of itself amount to an ouster and eviction, his co-tenant may strengthen his title by the purchase of a title acquired under a tax sale, and such purchase will not enure to the benefit of the tenant claiming exclusively under the patent title.

Appeal from Union Circuit Court.

THURSDAY, DECEMBER 12.

ACTION to quiet title to real estate. Hugh and Thomas Alexander were at one time the owners of the real estate in controversy. The plaintiff is the widow of Hugh Alexander, who died in 1857. A dower interest in the real estate accrued to her on the death of her husband. The county treasurer, in pursuance of a tax sale, conveyed the premises to Albert Evans, and he to the plaintiff. The defendant claims title to the undivided one-half of the lands, through conveyance from Thomas Alexander. The circuit court found for the plaintiff, and rendered a decree quieting the title in her. The defendant appeals.

Rowell & Milligan, for appellant.

McDill & Sullivan, for appellee.

Alexander v. Sully.

SEEVERS, J.—No objection is made to the validity of the tax deed under which the plaintiff claims; but it is urged
1. TAX sale: at the time she obtained title thereunder she was
tenant in com- a tenant in common or joint owner of the prem-
mon. ises with the defendant, or those under whom he claims, and
that her purchase of the superior title enured to the benefit
of the defendant upon his paying his *pro rata* share of what
it cost.

It does not appear when the tax sale took place, but Evans obtained title in July, 1871, and in September, 1873, he conveyed to the plaintiff. Thomas Alexander conveyed to Dosh in June, 1871, he to Burson, and the latter to the defendant in December, 1873.

It has been held that a tenant in common or joint owner cannot, by a purchase at a tax sale and a conveyance thereunder, oust his co-tenant, but that such purchase is presumed to have been made for the benefit of both. *Weare v. Van Meter*, 42 Iowa, 128; *Fallon v. Chidester*, 46 Iowa, 588.

The question for determination in the case at bar is materially different from this. Here the superior title was vested in a stranger, and had been for two years, and the question is whether one of the former joint owners can purchase such title for his own exclusive benefit, or whether, when the tax title accrued and became vested in Evans, the joint ownership previously existing was not thereby dissolved. That such would be the case is intimated, if not decided, in *Page v. Webster*, 8 Mich., 263.

The chancellor concedes, in *Van Horne v. Fonda*, 5 John. Ch., 388, that cases may exist where one tenant in common may purchase in an outstanding title for his own exclusive benefit; and the true rule seems to be, as there announced, that where the tenants or owners are in possession under an imperfect title one cannot purchase an outstanding title and appropriate the whole to himself and thus oust the other. See, also, *Venable v. Beauchamp*, 3 Dana, 321. But this prin-

ciple does not extend to a tenant in common after eviction. *Coleman v. Coleman*, 3 Dana, 398.

It is not affirmatively shown in the present case that either of the joint owners were in possession at the time Evans obtained the tax title, or at the time that plaintiff purchased of him. On the contrary, we think, it is fairly to be inferred from the record that neither of them was in possession at the times aforesaid.

If the superior title did not in and of itself amount to an ouster and eviction, we think the principle, under the circumstances, must be the same as if it did have that effect.

As neither of the joint owners was in possession, the outstanding title was not purchased to protect the possession or any other right either of the former joint owners then had.

Whatever title they previously had was merged in the superior title, and either could purchase for his own exclusive benefit as well as a stranger to the previous title could.

AFFIRMED.

THE STATE V. GUSTAFSON.

1. **Criminal Law:** SALE OF MORTGAGED PROPERTY. An indictment for larceny, growing out of the sale of mortgaged property, must aver that the mortgage was unsatisfied at the time of the offense charged.

2. ———: GOOD CHARACTER. It is proper to instruct the jury that, in passing upon the guilt or innocence of the accused, proof of good character constitutes an ingredient to be considered by them, without regard to the character of other evidence, and that its weight is to be determined by them.

Appeal from Webster District Court.

THURSDAY, DECEMBER 12.

THE defendant was convicted of grand larceny, and sentenced to the penitentiary for the term of twelve months. He

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108	69
50	194
111	246
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112	464
50	194
6122	106

The State v. Gustafson.

now appeals to this court. The facts of the case, involved in the points ruled in the opinion, are found therein.

Hudson & Wright, for appellant.

J. F. McJunkin, Attorney-General, for the State.

BECK, J.—I. The crime for which defendant was convicted is created by Code, § 3895, which provides as follows: “If
 1. CRIMINAL
 law: sale of
 mortgaged
 property. any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage, without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and punished accordingly.”

The indictment charges the offense in the following language:

“The said John E. Gustafson, on the 13th day of May, 1876, in the county aforesaid, did make, execute and deliver a certain chattel mortgage of forty-five steers of the age of three years each, and fifteen steers two years old each, to one E. C. Burnett, to secure the payment of a note made by the said John E. Gustafson to said E. C. Burnett, for the sum of eight hundred and twenty-eight dollars and sixteen cents, of the same date of said mortgage, payable May 1, 1877, and the said John E. Gustafson, on the 8th day of January, 1877, in the county aforesaid, wrongfully, unlawfully, wilfully and feloniously did sell, conceal and dispose of thirty-five of the aforesaid three-year-old steers without the knowledge or consent of the said E. C. Burnett, and the said E. C. Burnett was then and there the absolute owner and the then holder of said mortgage and the said note, and the said thirty-five steers were then and there of the value of forty dollars each, and of the aggregate value of fourteen hundred dollars, the same being their value on the said 8th day of January, 1877.”

It will be observed that to constitute larceny under the statute the disposition of the mortgaged property must be made

The State v. Gustafson.

while the mortgage "remains unsatisfied." If the mortgage debt has been paid, or the mortgage in any other way has been discharged, the disposition of the property forbidden by the act would not amount to larceny. The same result would follow if the debt remained unpaid and the lien of the mortgage were released.

The indictment must allege every matter the law requires to be proved in order to authorize a conviction; every ingredient of the offense must be fully charged. A want of these requirements in the indictment cannot be supplied by the findings of the jury. These doctrines are elementary and familiar.

There is no averment in the indictment that the mortgage was, when the acts constituting the offense are laid, unsatisfied, or that the lien thereof, or the title passed thereby, was not discharged. There is no averment in the indictment that can be interpreted to express such a thought. The Attorney General insists that in averring the mortgagee "was then and there the absolute owner, and the then holder of said mortgage and note," the pleader must be understood to allege that the mortgage remained unsatisfied. We think differently. We are of the opinion that one may be the owner and holder of a satisfied mortgage and note: but if the payment of the debt pass the ownership of the instruments to the debtor, or render them valueless, so that they cannot be the subject of property, the same result would not follow if the debt remained unpaid and the mortgage lien was discharged. The papers would be of value, and would remain the property of the mortgagee, yet the mortgage would be satisfied.

II. Evidence of good character was introduced by defendant. As applicable to this defense the court gave the following instruction:

"7. While evidence of former good moral character cannot overcome positive evidence of guilt, yet it is proper for you, in the absence of positive evidence of guilt, to consider any evidence of former good moral

2. ———: good
character.

Powers v. The City of Council Bluffs.

character, as tending to show the improbability of defendant's having committed such an offense. But if you find the evidence positive and conclusive as to the defendant's guilt, then his former good moral character cannot be considered and weighed by you."

This instruction is erroneous, and ought not to have been given. It is in conflict with more than one prior decision of this court. See *State v. Northrup & Bartlett*, 48 Iowa, 583; *The State v. Fitzgerald*, 49 Iowa, 260.

The true rule was embodied in an instruction asked by defendant, which ought to have been given. It is in the following language:

"10. In passing upon the guilt or innocence of the defendant proof of good character constitutes an ingredient to be considered by you, without reference to the apparently conclusive or inconclusive character of the other evidence, and it is for you to determine what weight such evidence of character shall have with you."

For the errors above pointed out the judgment of the District Court must be

REVERSED.

POWERS V. THE CITY OF COUNCIL BLUFFS.

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99	508

1. **Municipal Corporation : NEGLIGENCE OF OFFICERS.** Where the officers of a city have knowledge of the construction of improvements in a negligent manner, it is no defense against the consequences of such negligence that it was not authorized by the city council, which was charged with the making of the improvements.
2. ——— : ——— : **CARE REQUIRED.** While a city is not liable for the consequences of a mere mistake, in a matter to be determined by the judgment of its officers, yet it can obtain such immunity only by showing that the mistake occurred while in the exercise of reasonable skill, prudence and care.

Powers v. The City of Council Bluffs.

3. ——— : IMPROVEMENT OF STREETS : NEGLIGENCE. Where a city establishes grades and improves streets, and the owners of adjacent property make improvements with reference thereto, the city is liable for negligently permitting obstructions by reason of which injuries occur to the property owners, even though such obstructions leave the property in no worse condition than it was before the city had improved the streets.
4. ——— : WATER-WAYS : PREVIOUS FLOODS. It is the duty of a city to provide water-ways sufficient to carry off the water that might be reasonably expected to accumulate, judging from such floods as had previously occurred.

Appeal from Pottawattamie District Court.

THURSDAY, DECEMBER 12.

ACTION to recover damages by reason of plaintiff's premises being overflowed by water caused by an alleged defective sewer. A jury was waived, and there was a trial by the court.

At the request of the parties the court made the following special findings of fact :

1. That plaintiff is the owner of lots 25 and 38, in the original town of Council Bluffs, and that he has owned the same for more than five years before the commencement of this action.
2. That said lots front on Broadway in that city.
3. That before the streets in said city were improved, or any system of drainage, was adopted by said city, the natural drainage carried the surface water from a very large scope of country over and across said lots.
4. That prior to the year 1869 the city had improved a street, called Madison street, in such manner as that a large portion of the surface water coming down on the west side thereof, and which, but for the improvement of said street, would have flowed upon and over plaintiff's lot, was conducted away from said lot.
5. That in the year 1869 the city constructed a sewer across Broadway, which was intended to and did receive such surface water as flowed to it through a channel or water-way

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across said street, into which channel a number of sewers and drains constructed by the city emptied.

6. That the said sewer across Broadway emptied into another sewer or drain constructed by the city, which conducted the water along the west line of plaintiff's property, and into a creek which flowed at the north side of said property.

7. That said sewer across Broadway, at the time of its construction, was of sufficient capacity to carry the surface water which would then be conducted to it by the sewers and water-ways then leading to it.

8. That in the year 1870 a gas-pipe was laid across said sewer, with the knowledge of the authorities of said city: that said pipe was inclosed in a box nine inches square, the top of which box was from twenty-one to twenty-four inches above the bottom of the sewer.

9. In the year 1871 the city constructed a sewer across Madison street, which received and conducted to the Broadway sewer the surface water, which, between the time of the improvement of Madison street and the construction of said sewer across that street, was conducted down that side thereof, which was two hundred feet from the plaintiff's premises.

10. That about the 1st day of June, 1875, there was a very heavy but not unusual rain-fall in said city, which caused a large amount of surface water to collect in the water-ways and sewers leading to said Broadway sewer, and that brush and other material floated by said waters into said sewer lodged against the box inclosing said gas-pipe, and formed a dam of sufficient strength to prevent the passage of any water through the sewer except such as flowed over the top of said box, and by reason of said obstruction the capacity of the same was reduced about one-third.

11. By reason of the insufficient capacity of said sewer to carry the water coming to it said water flowed over and across said street into plaintiff's premises, flooding the same,

Powers v. The City of Council Bluffs.

and causing damage thereto to the amount of one thousand two hundred and seventy-five dollars.

From the foregoing facts the court finds, as a matter of law, that the defendant is liable for the damage so caused. Judgment accordingly. Defendant appeals.

G. A. Holmes and John H. Keatley, for appellant.

Sapp & Lyman, for appellee.

ROTHROCK, CH. J.—I. That a gas-pipe was laid across the sewer in the manner as stated in the eighth finding of fact does not admit of controversy. This finding is fully established by the evidence. One Joel Eaton was called as a witness by the plaintiff. He testified that he was secretary of the Council Bluffs Gas Company, and that in 1870 said company put down a pipe across the sewer in question. He was then asked to state by whose permission or authority he laid down those gas-pipes; to which he made answer that it was done by permission of Palmer, the mayor of the city. The question and answer were both objected to as incompetent, and as not the best evidence of the right to use the streets, and upon the ground that the city can be bound only by the acts of the city council. The objection was overruled. The witness proceeded to state that the mayor directed the gas-pipe to be put in, and that plaintiff was present and made objection to the mayor.

L. W. Babbitt, who was a member of the city council when the gas-pipe was laid, testified that the matter of putting the gas-pipe across the sewer was discussed in the council before and after the pipe was laid.

The plaintiff testified that the year after the gas-pipe was put in the culvert failed to carry off the water, and that he then notified the members of the city council, and asked them to do something about it.

It is urged in the argument that this evidence should not have been admitted, because the city could only give consent

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to the laying of the pipe by its council, while in session. We apprehend that as city councils have authority to construct sewers, and have control of the streets for that purpose, and authority to permit gas-pipes to be laid, it would be a most unreasonable requirement to compel a party injured by negligent or improper construction to show that the city council, by resolution or vote, authorized the negligent acts to be done. The city acts through its officers in making improvements, and is bound by their negligence. If the gas-pipe were an obstruction the notice given by the plaintiff to the members of the city council was sufficient. See *Rowell v. Williams*, 29 Iowa, 210.

II. It is urged that deciding to put in the gas-pipe across the sewer was a judicial act upon the part of the city, and 2. ____: ____: that, for an error of judgment as to its effect as care required. an obstruction, the city is not liable. This proposition leaves out of view the important consideration that in putting in said obstruction, or permitting it to be done, the city exercised reasonable skill, prudence and care. For a mere mistake, notwithstanding the exercise of proper care and the employment of competent skill, the corporation would not be liable. See *Vanpelt v. The City of Davenport*, 42 Iowa, 308.

In view of the fact, as found by the court, that the sewer was of sufficient capacity when it was constructed to carry off the water without injury to the adjoining premises, and that after it was obstructed by the gas-pipe it was not sufficient, of which the city had notice, it is evident that if the city was not culpably negligent in permitting the obstruction in the first instance, there was negligence in allowing it to remain.

III. It is urged that it was the right of the city to abandon all sewerage, and cease to keep up repairs, and allow the surface water to flow as it was wont to do without sewers, provided the property of individuals is placed in no worse condition by such a course than before any improvements were made. To this proposi-

3. ____: im-
provement of
streets: neg-
ligence.

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tion we cannot assent. Where a city establishes grades, improves streets, makes culverts, etc., and the owners of property build and improve with reference to the improvements made by the city, the corporation is liable for negligently permitting obstructions by reason of which injuries occur to the property owners. It cannot escape liability upon the ground that the negligent acts caused the water to flow where it did originally. *Damour v. Lyons City*, 44 Iowa, 276.

IV. It is insisted that the flood which caused the injury was extraordinary in its destructive character, and that the finding of the court that the rain-fall was not
4. ———: water
ways: previ-
ous floods. unusual was contrary to the evidence. All of the witnesses who were interrogated upon the subject state that in that locality many severe rain storms have occurred. It is conceded by counsel for the appellant that the evidence shows that one storm in 1858 and another in 1869 were about equal in point of force and violence to that which occasioned the injury. The rule is that it is the duty of the city to provide water ways sufficient to carry off the water that might reasonably be expected to accumulate, judging from such floods as had previously occurred. That the finding in this case is correct under this rule see *Damour v. Lyons City*, *supra*, and *Mayor v. Bailey*, 2 Denio, 433.

V. Finally, we may say that a careful examination of the testimony of all the witnesses has led us to the conclusion that all of the findings of fact find sufficient support in the evidence.

AFFIRMED.

The State v. Morris.

THE STATE V. MORRIS.

1. **Attachment :** WHERE STATE IS PLAINTIFF. Demand of payment must first have been made of the party against whom an attachment is sought to entitle the State thereto under sections 3005 and 3006 of the Code.
2. ——— : CAUSE FOR. An affidavit to the effect that the defendant is in another State, and that he is about to sell or remove his property, is not sufficient to authorize an attachment.

Appeal from Lee District Court.

THURSDAY, DECEMBER 12.

THE petition in substance alleges that the defendant furnished large quantities of goods and suits of clothing to the State for the penitentiary located at Fort Madison, and that, combining and colluding with Seth H. Craig, warden, he took unto himself and received large gains and profits, which were excessive, unjust and fraudulent. The petition prays judgment for five thousand dollars, and asks the issuance of a writ of attachment.

Attached to the petition were the following affidavits:

"I, C. B. Worthington, being duly sworn, on oath say, that I heard most of the evidence of S. H. Craig, given before the committee appointed by the Legislature to investigate the affairs of said S. H. Craig, late warden; that I have examined the books and papers of said penitentiary, and from said evidence and examination, and other information, I verily believe that one M. Morris, late of Fort Madison, Iowa, has received from S. H. Craig, as said warden, at least the sum of five thousand dollars overcharges in excess of what he ought to have received for clothing claimed by him to have been sold to said warden for the State; that I verily believe that said Morris is now in Chicago, and that he is about to

The State v. Morris.

sell or remove his property from the State of Iowa, or make some disposition of the same."

"I, D. N. Sprague, on oath do state that I am District Attorney of the first judicial district of Iowa; that from information I do verily believe it to be a fact that defendant, M. Morris, is indebted justly to the State of Iowa; that the sum of five thousand dollars is justly due the State of Iowa from him, and that the defendant so absents himself that no demand for security or payment has been or can be made upon him, and that, unless an attachment is issued against the property of defendant, there is danger that the amount due will be lost to the State."

An attachment was duly issued and was levied upon the property of the defendant. Afterward the defendant moved to discharge the attachment upon the following grounds:

"1. Insufficiency in the statement of cause thereof in this: That the petition states no cause for an attachment, such as the law requires; that the affidavit of the District Attorney does not state that the defendant has refused to pay or secure the indebtedness upon which the attachment issued, for that it appears from the face of the papers in the case that no demand upon the defendant to pay or secure the sum was made.

"2. It is apparent, from the face of the record, that the attachment should not have issued, for that the demand sued on is not founded on contract; and the petition should have been presented to some judge of the Supreme, District or Circuit Court, to have an allowance made thereon of the amount in value of the property to be attached, before such attachment could issue; and the record shows that such was not done. The averments of the petition do not constitute such claim of indebtedness due the State as that contemplated by sections 3005 and 3006 of the Code, and said sections do not authorize an attachment upon the allegations of the petition."

The court sustained this motion. The plaintiff excepted and appealed.

The State v. Morris.

J. F. McJunkin, Attorney General, and D. N. Sprague, District Attorney, for appellant.

Casey & Hobbs, for appellee.

DAY, J.—I. Sections 3005 and 3006 of the Code are as follows: “In all cases in which any person is indebted to the State of Iowa, or to any officer or agent of the State for the use or benefit of the State, the proper District Attorney, or the Attorney General, shall demand payment or security therefor whenever, in the opinion of said District Attorney or Attorney General, the debt is not sufficiently secured. In all suits for money due to the State of Iowa, or due to any State agent or officer for the use of the State, it shall be lawful for an attachment to issue against the property or debts of the defendant, not exempt from execution, upon the filing of an affidavit by the District Attorney of the proper district, or of the Attorney General, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused to pay or secure the same, and that unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the State.”

These sections evidently contemplate that an attachment shall issue, for the cause therein stated, only when demand has been made upon the debtor for payment or security, and he has refused to pay or secure the claim. The affidavit in this case does not state that the defendant has refused to pay or secure the demand. In fact, it states that no demand for payment or security has been made upon the defendant, for the reason that he so absents himself that no demand can be made. It is not even stated that the defendant absents himself to avoid a demand for payment or security.

It appears, from the affidavit of Worthington, that the defendant is in Chicago. No reason is given why demand

1. ATTACH-
MENT: where
state is plain-
tiff.

The State v. Morris.

for payment or security might not have been made upon him there. The statute has not authorized an attachment in case the defendant is absent from the State so that demand for payment or security cannot be made within the State; and were we to extend the statute to such a case by construction, our act would be nothing less than judicial legislation. If it is desirable that an attachment should issue in such a case the remedy must be provided by the Legislature.

II. It is claimed, however, that sufficient has been alleged to authorize an attachment under section 2951 of the Code.

2. _____; cause
for. It is said the affidavit of the District Attorney shows that the defendant cannot be found, and the affidavit of Worthington shows that the defendant is in Chicago, and that he is about to remove his property from the State of Iowa. It is not stated in the affidavit of the District Attorney that the defendant has absconded, so that the ordinary process cannot be served upon him. Merely absenting one's self is not equivalent to absconding. The affidavit of Worthington shows that defendant is in Chicago, but not that he is a non-resident of the State of Iowa. It states further that he is about to sell or remove his property from the State of Iowa, or make some disposition of same. In addition to the objection that facts are here stated in the alternative, there is a failure to state, as the statute requires, that the removal contemplated is without leaving sufficient remaining for the payment of his debts. No cause for attachment is assigned under section 2951 of the Code.

III. Should we be of opinion that there was no error in sustaining the motion to quash, we are asked to send the cause back to the District Court, with instructions that the plaintiff have leave to amend the affidavit for attachment, as provided in section 3021 of the Code. This is a law action, reviewable here simply upon errors assigned. No leave to amend was asked in the court below, and hence that court made no ruling upon the right to amend. Having determined

Austin v. Wilson.

that the court below committed no error of law, our duty is to affirm the case. The remaining causes assigned in the motion to discharge need not be considered.

AFFIRMED.

AUSTIN V. WILSON ET AL.

1. **Vendor and Vendee: EVIDENCE.** Evidence considered which was *held* insufficient to sustain a defense, on the ground of payment, to an action to recover possession of real estate which the defendant occupied under a bond for a deed.

Appeal from Winneshiek Circuit Court.

THURSDAY, DECEMBER 12.

ACTION to recover possession of certain real estate in the city of Decorah. The legal title is in the plaintiff. The defendants filed an equitable answer, averring that the defendant S. O. Wilson purchased the premises of the plaintiff, executed his promissory notes for the purchase money, and took a bond for a deed; that the defendant Sarah L. Wilson has acquired the rights of S. O. Wilson; that the notes given for the purchase money have nearly all been paid, and that she has tendered the plaintiff five hundred and seventy-seven dollars, which is sufficient to cover all that is due him for purchase money, interest and taxes. The court found that the amount tendered was sufficient, and rendered a decree for the defendants. The plaintiff appeals.

E. E. Cooley, for appellant.

Adams & Bullis, for appellees.

ADAMS, J.—There were five notes given for the purchase money—two for twenty-five dollars each, two for one hundred and fifty dollars each, and one for fifty dollars.

1. **VENDOR and vendee: evidence.** The tender was made upon the theory that the whole purchase money had been paid except seventy-five dol-

Austin v. Wilson.

lars and interest. What was tendered above that was to reimburse the plaintiff for taxes. The plaintiff denies that any part of the purchase money has been paid except twenty-five dollars, paid when the bond was given and not embraced in any note, and he insists that there is no evidence tending to show that more than that has been paid. The defendants, to show payment, put in evidence what purport to be two notes, for twenty-five dollars each, payable to Benjamin Austin, with signature torn off, and S. O. Wilson testified that they were two of the notes described in the bond; but we see no evidence that any one of the other notes has been paid. The evidence relied upon is the testimony of S. O. Wilson. He testified that to the best of his knowledge all the notes were paid except the note for fifty dollars, but when further examined as to what the best of his knowledge was it appears that he had no knowledge at all.

At the time of the pretended payments the witness was in the military service of the United States in the Territory of Dakota. While there he says that as he received payment for his services from the United States he sent the money home to his wife, the defendant Sarah L. Wilson. He says, also, that he sent most of the money to one Nelson Burdick. We infer that he means that what he sent to his wife was sent through Burdick. He says he sent the money home to take up these notes and others, and that he gave his wife instructions to find the notes. The only amount specified is seventy-five dollars. That amount, it appears, was at one time delivered by Sarah L. Wilson to Burdick to pay on the plaintiff's notes. But it was not so paid, and after considerable time it was returned to Mrs. Wilson.

The testimony of Burdick was taken, and he says that he returned it because he found no one to pay it to. There is no evidence that Burdick was the plaintiff's agent, or ever had any one of the notes in his possession, except that on one of the notes for twenty-five dollars some figures are indorsed in his handwriting. As to how he came by the note he says he has

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no knowledge. The defendant Sarah L. Wilson does not testify that she ever paid anything. The plaintiff, during the time, resided in Massachusetts, and his residence was unknown to the defendants. There is no pretense of a payment directly to him. The defendants' theory seems to be, if we understand their counsel, that Burdick had one of the notes for collection; that he was, therefore, plaintiff's agent to collect all the notes, and that payments were made to him. But this theory is entirely without support. In our opinion there is no evidence that any one of the three large notes has been paid. It follows that the tender was insufficient, and as the bond has been forfeited the plaintiff is entitled to judgment.

REVERSED.

SHELDON V. BOOTH.

1. **Evidence : EXPERT TESTIMONY.** Under an issue of breach of warranty of a machine, a witness, who testified that he had operated a similar machine six or eight years and had seen the one in controversy in operation, was *held* competent to testify as to the kind of work it would perform.
2. ——— : ——— : **MACHINIST.** A machinist is competent to give an opinion as an expert in relation to the construction of machinery.
3. **Practice : AMENDMENT.** Where an amendment, setting up a new and different defense, is filed after a part of the evidence has been introduced, and the plaintiff does not at the time indicate an unwillingness to proceed in consequence thereof, he cannot be heard to complain after a verdict has been rendered.

Appeal from Howard Circuit Court.

THURSDAY, DECEMBER 12.

ACTION on a promissory note given in part payment of a threshing machine which was sold with a warranty, a breach of which was pleaded as a defense. There was a trial by a

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jury. Verdict and judgment for the defendant. The plaintiff appeals.

H. A. Stowe & Co., F. S. Burling and Stoneman & Chapin,
for appellant.

H. C. McCarty, for appellee.

SEEVERS, J.—I. The plaintiff claimed that the note and others, at the time the machine was purchased, were, by agreement of both parties, placed in the hands of Platt & O'Malley, and were to be delivered to the plaintiff whenever the defendant was satisfied with the machine; and that the defendant, after a trial of the machine, expressed himself as satisfied; and that the notes were delivered to the plaintiff with defendant's consent.

No objection is made to the instructions on this point, but it is insisted the verdict is contrary thereto. A careful consideration satisfies us there was a conflict in the evidence on this question, and that, under the settled practice, we cannot interfere with the verdict for this reason.

II. It is said the jury disregarded the instructions of the court in relation to the measure of damages. In this we cannot concur, because there was some evidence tending to show the defects in the machine could not be remedied by a reasonable outlay of labor and expense.

III. One Perkins was asked, when on the stand as a witness, "how much less this machine was worth than those,"
1. EVIDENCE: referring to other machines; and, also, "how much
expert testi- less was it worth than a machine that would run
mony. and do first-class work." The objection to these questions made in the court below was, witness not "competent." Perkins testified he had run a threshing machine six or eight years, and had seen this machine when in operation. We think the objection is not well taken.

IV. Fred. Swenson testified he was a "foundryman and

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machinist," and had been such for five years. In reference
2 —: —: to some portion of the machine he was asked:
machinist. "Was this movement backward and forward of
the cylinder an indication of a good-constructed machine?"
and, also, "State whether the condition in which you found
that gearing indicated that the machine had been properly
constructed." The only objection made below to these ques-
tions was that "the witness had not shown himself compe-
tent to give an opinion."

A machinist must necessarily, we think, be competent to
give an opinion as an expert in relation to machinery. A
cross-examination as to his knowledge might have demon-
strated the fact that he did not possess the requisite knowl-
edge; but, as the question for determination was presented to
the court below, we feel constrained to say there was no error
in the ruling.

V. The following question was asked the witness Black-
mar: "I ask whether it was easy to take a particular machine,
defective at its original construction, and make such repairs
on it as that it will be a good machine." An objection that
the question was immaterial and irrelevant, and that the wit-
ness was not an expert, being overruled, the witness answered:
"No, sir; they cannot make as good a machine of it." The
court instructed the jury that the measure of damages, in case
there was a finding for the defendant, "was the difference in
the value of the machine as it was warranted to be and its
value as it really was."

It was immaterial whether the machine in question or any
other machine could be easily repaired, if defectively con-
structed, or whether it was difficult to do so. The foregoing
instruction stated the correct rule as to the damages the
defendant was entitled to recover, and the foregoing evidence
could not have influenced the jury as to the amount of such
recovery; nor could it have the slightest bearing on the
question of warranty or any other question in the case. Its
admission, therefore, was error without prejudice.

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VI. One Frisby testified on the part of the plaintiff that he had purchased a half interest in the machine of the defendant. On cross-examination he was asked whether he had paid for it. He answered "Partly." He was then asked, "Why have you not paid for the whole?" An objection that it was immaterial was overruled, and the witness answered: "Well, for the reason that we have not threshed enough to pay for it." We are unable to see the importance of this evidence, or that it was in any degree prejudicial. It could not possibly have influenced any one of ordinary sense or understanding, and such the jury must be presumed to be.

The testimony offered as to the effect of exposing the machine to the weather was properly rejected. Its admission would not have any tendency to establish any issue made by the pleadings.

VII. During the progress of the trial, and after a portion of the evidence had been introduced, the defendant filed an amended answer, setting up a new and different defense from what had been before pleaded.

8. PRACTICE:
amendment.

The plaintiff, however, did not claim to be surprised thereby, nor did he ask for a continuance; but the trial proceeded to its conclusion, and then, for the first time, and after an adverse verdict, the plaintiff claims to have been surprised, and that there exists certain testimony by which he can disprove the answer, and affidavits were filed setting forth such evidence.

When the amended answer was filed the plaintiff should have asked for a continuance, or taken some other course that indicated he was unwilling to proceed with the trial because of the filing of such answer. He cannot take the chances of a favorable verdict, and complain if it happens to be adverse. *Hopper v. Moore*, 42 Iowa, 563.

We have carefully examined the instructions, and find they are not vulnerable to the objections made.

It is suggested the court should have given an instruction as to the effect of an alleged settlement. It is sufficient to say that none such was asked.

Hamilton v. The City of Dubuque.

The presumption is that the point was abandoned below, and it cannot be made here under such state of facts.

AFFIRMED.

HAMILTON V. THE CITY OF DUBUQUE.**1. Statute of Limitations: RECOVERY OF TAXES: MUNICIPAL CORPORATIONS.**

An action against a city for the recovery of taxes wrongfully collected is barred in five years from the time of payment.

Appeal from Dubuque District Court.

THURSDAY, DECEMBER 12.

THE petition states that the defendant, in the year 1863, and several years prior thereto, levied and assessed taxes on certain real estate described in the petition, and the same being unpaid and delinquent, the "defendant, by its treasurer, or collector of taxes, claiming to be thus ordered, authorized and directed by the corporate officers or authorities thereof, and representing and declaring that it, the said defendant, had, under the laws of the State of Iowa, full power and authority to sell and convey said property for and on account of the taxes aforesaid levied thereon, and said plaintiff, relying on said representations and declarations of said defendant, made by its corporate officers at a public auction or sale, at which the real property described in petition, and the same at said sale, "on the 22d day of August, 1864," was struck off to the plaintiff, and the amount bid by him was paid to and received by the defendant, and a certificate of sale issued to the plaintiff.

It is then averred that plaintiff paid certain subsequent taxes on the premises so purchased. It is not deemed essential to set such averments out in full. It is further stated that in August, 1872, "the council of said city of Dubuque passed an ordinance," a copy of which is contained in the

Hamilton v. The City of Dubuque.

petition, and it provides "that when, by mistake or wrongful act of the treasurer and collector, real property has heretofore been sold which was not liable to be sold, * * * the city shall refund to the purchaser the amount wrongfully collected of him, together with ten per cent interest. * * *"

Judgment is asked for the amount bid at the time of the tax sale and the money subsequently paid, with ten per cent "from the respective dates of payment, in accordance with the provisions" of the ordinance.

There was a demurrer to the petition on the ground that the cause of action was barred by the statute of limitations, and the same having been overruled the defendant appeals.

H. T. McNulty, for appellant.

M. H. Beach, for appellee.

SEEVERS, J.—I. It is objected by the appellee that the assignment of errors is insufficient. This objection may have been well taken when counsel prepared his argument; but since then, at the term and before the cause was submitted, the appellant had leave to amend the assignment of errors. This has been done, and the objection is not well taken, for the reason the assignment of errors before us is clearly sufficient.

II. The sale was in 1864, and the last time the plaintiff paid any money in discharge of taxes subsequently levied was in 1869. In *Brown & Sully v. Painter*, 44 Iowa, 368, it was held that an action brought for the recovery of taxes paid was barred in five years from the payment. This case has been followed in several cases, and must be regarded as the established rule.

In *Callanan v. Madison County*, 45 Iowa, 561, the same ruling was made when such defense was relied on by the county. There cannot be any distinction in this respect between a county and a municipal corporation like the defendant. The cause of action is, therefore, fully barred

1. STATUTE of
limitations:
recovery of
taxes: munic-
ipal corpora-
tions.

 Webster v. Hunter.

unless it is saved by the ordinance referred to in the petition.

III. A careful examination of the petition satisfies us that the right to recover is not based on the ordinance, or rather that it is not based on a "mistake or wrongful act of the treasurer," and, therefore, the ordinance does not take the case out of the operation of the statute.

The allegation is that the sale was made by the wrongful act of the city. It is true the officers of the city, including the treasurer, it will be conceded, represented and declared "that it, the said defendant, had, under the laws of the State of Iowa, full power and authority to sell and convey said property for and on account of the taxes aforesaid levied thereon." The city could speak only through its officers, and the wrongful act was the act of the corporation, if the power to sell did not exist; that is to say, it is not averred to be the wrongful act of the treasurer.

REVERSED.

 WEBSTER V. HUNTER.

1. **Foreign Judgment: LAWS OF ANOTHER STATE.** In an action on a foreign judgment the laws of the State in which it was rendered, in the absence of evidence to the contrary, will be presumed to be the same as ours.
2. ———: **JURISDICTION: EVIDENCE.** The return of an officer showing service of process, by which the court claimed to obtain jurisdiction, may be contradicted by parol evidence.

Appeal from Fremont Circuit Court.

THURSDAY, DECEMBER 12.

ACTION on a judgment rendered by the Circuit Court of Mercer county, Illinois. In his answer the defendant alleged that the court rendering the judgment had no jurisdiction of his person, because no summons nor original process of any

50	215
105	208
105	635
50	215
106	457
50	215
124	88

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kind had ever been served on him. There was a trial by jury, and verdict and judgment for the defendant.

The plaintiff appeals.

Stow & Hammond, for appellant.

Sears & Thornell, for appellee.

SEEVERS, J.—There is no recital in the judgment that the court found the defendant had been served with process, nor does it appear he appeared to the action. The judgment was rendered by default. The record was introduced in evidence, and it contained two summonses. The return of the officer thereon showed service on the defendant. What is designated in the record as summons “A,” required the defendant to appear on the second Monday of March, 1859, and answer unto the plaintiff “in a plea of trespass on the case upon promises.” This notice was served, according to the return, on the 16th day of February, 1859. No declaration, however, was filed until the 8th day of April thereafter. The court refused to permit this notice to be introduced in evidence.

In March, 1859, another summons was issued which is designated in the record as summons “B.” This required the defendant to appear on the third Monday in April, 1859, and the return of the officer showed it was served on the 16th day of April, and the judgment was rendered in September thereafter. The laws of Illinois were not introduced in evidence, and it is insisted—

I. That the court erred in excluding from the jury summons “A” and the return thereon. As another summons was afterward issued and served (as it is claimed) on the defendant, such fact tends to show the one first issued had been abandoned. The defendant testifies he so regarded it. But, be this as it may, as no declaration was filed until after the defendant was required to appear the action will be deemed discontinued. Code, § 2600.

The laws of Illinois, in the absence of testimony to the

1. FOREIGN
judgment:
laws of an-
other state.

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contrary, will be presumed to be the same as ours. *Stevens v. Williams*, 46 Iowa, 540. There was no error, therefore, in excluding the summons whereby the action was instituted which by operation of law was discontinued.

II. The defendant introduced parol evidence tending to show that summons "B" was not in fact served on him. The court instructed the jury that the introduction of the record and judgment in evidence cast on the defendant the burden to prove he was not in fact served, but that, if they so found, the plaintiff could not recover. We are unable to see any valid objection to the instructions, if the return of the officer may be contradicted by parol evidence, and we believe the only objection urged by counsel is that the court therein limited the jury to a consideration of summons "B."

This court, in an action on a judgment rendered in another State, has recently held in *Lowe v. Lowe*, 40 Iowa, 220, that the return of an officer, showing service of process by which the court in said State obtained, or rather claimed to have, jurisdiction of a defendant, might be contradicted by parol evidence. Authorities are cited in support of the decision. See, also, 2 American Leading Cases, 611 to 664, for a full discussion and citation of authorities on this subject. We are not disposed to depart from the rule above stated.

III. It is urged the court erred in refusing to permit the plaintiff, as fully as was desired, to cross-examine the defendant in relation to the summonses, and service thereof. It is also insisted the verdict is contrary to the evidence. As to the latter it is sufficient to say, if the jury believed the testimony of the defendant the verdict is right. That they did so is clear, and there is nothing in the record which will warrant us in saying the verdict in this respect is wrong.

The defendant, as we understand, admitted that summons "A" was served on him, and on cross-examination he stated that no other papers were served on him, but that one Miles "threatened" him. The plaintiff desired to inquire how long

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after the first paper was served the threats were made, and about when a notice "to quit the place" was served, and how long it was after summons "A" was served. We are unable to see wherein the discretion vested in the trial court in this respect was abused. We feel satisfied the plaintiff was in no manner prejudiced by the ruling.

AFFIRMED.

DONAHO ET AL. V. SMITH.

1. **Res Adjudicata: DOWER: ESTOPPEL.** A proceeding by a widow for dower in certain lands, to which her husband held the legal title, is not an adjudication of her rights in other lands in which her husband had an equitable interest, nor is she estopped thereby from claiming an interest in such lands.
2. **Conveyance: MISTAKE: ADMINISTRATOR.** To authorize that a conveyance by an administrator be set aside, on the ground of mistake, it is not sufficient to establish that the grantee knew the grantor had a personal interest in the land conveyed, but it must also be made to appear that he did not intend to convey in his personal as well as representative capacity.

Appeal from Montgomery Circuit Court.

THURSDAY, DECEMBER 12.

THE plaintiffs are the widow and heirs of Thomas Donaho, deceased. It is claimed in the petition that said Thomas Donaho and his brother, Allen S. Donaho, purchased certain lands of one Stype; that each of said brothers paid one-half of the purchase money, and that, for convenience, the title deed was taken in the name of Allen S. Donaho only; that about December, 1857, and August, 1860, said Allen S. Donaho, with the knowledge and consent of his brother Thomas, sold and conveyed two parcels of said land to the defendant, and that said sales were made for the benefit of said Allen S. and from his undivided half of said lands; that Allen S. Donaho died in the year 1860, but that before his death the

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two brothers made a division of said lands; that Thomas took that part lying west of the Nodaway river, and Allen S. that part lying east of said stream, but no deeds of conveyance were made; that Thomas Donaho was appointed and qualified as administrator of the estate of his brother, Allen S., and on the 10th day of April, 1868, in pursuance of an order, upon proper application, sold and conveyed to defendant all of said land; that said sale and deed were not intended to include all of said land, but only that part lying east of the Nodaway river, and that the part lying west of said stream in truth and fact belonged to said Thomas, and not to the estate of said Allen S.; that such was the understanding between said Thomas and the defendant when the deed was made and delivered; that Thomas Donaho died intestate in 1868, and in 1870 one Cooper, administrator *de bonis non* of the estate of said Allen S. Donaho, made a second deed of said lands, which was intended only to convey the land actually owned by Allen S. Donaho; that in 1865 the heirs of Allen S. Donaho made a conveyance of the said land west of the Nodaway river to said Thomas Donaho.

The prayer of the petition is that the land lying west of the Nodaway river be decreed to plaintiffs, and that said administrator's deeds be held to cover only that part of the lands lying east of said river.

The answer denies that Allen S. and Thomas Donaho were equal owners of said land, and avers that the former was the sole owner thereof. Denies that the two brothers made any division of said lands. Avers that at the time of the sale of the lands by Thomas Donaho, as administrator, he represented to the defendant that the lands belonged to the estate of his brother, and that he had no interest therein, but agreed to and did sell the whole thereof to defendant, and gave him possession thereof, and defendant has held the same ever since. By an amendment to the answer the defendant set out the proceedings in the Probate Court for the sale of said land, showing that the petition, order of sale, etc., included the

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land in controversy, and pleading said record and deed as an estoppel against Thomas Donaho and his heirs.

To this amendment the plaintiff replied by averring that a mistake occurred in said deeds, and that they were only intended to convey the land lying east of the Nodaway river.

The defendant filed a second amendment to his answer, in which he averred that in December, 1874, Electa E. Donaho, widow of Thomas Donaho, commenced an action against the heirs of said Donaho for the purpose of having her dower interest in all the real estate her husband died seized of set apart to her by said court; that in said suit she did not include and claim dower in the land in controversy in this action; that her dower was, by decree, set off to her without including the land in controversy, and that by reason thereof she is estopped from asserting any claim against the defendant.

To this amendment there was a demurrer, which was sustained, and the defendant excepted. Upon these issues the cause was tried before a referee, who reported in favor of a decree for the plaintiffs. Exceptions to the report were overruled, and a decree was entered as recommended in the report of the referee. Defendant appeals.

Hewitt & Richards, for appellant.

C. D. Gray and *W. M. Wright*, for appellees.

ROTHROCK, CH. J.—I. We think the demurrer to the second amendment to the answer was properly sustained. The facts therein set forth are pleaded as an adjudication of the rights of Electa E. Donaho in the land in controversy. That said record is an adjudication in favor of this defendant cannot be claimed, because he was not a party nor was he privy thereto. The widow may well have instituted her proceeding for dower in the lands to which her husband had the legal title, without in any manner prejudicing her equitable rights in lands held by other persons. The

1. RES adjud-
cata: dower:
estoppel.

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most that can be claimed for the facts pleaded in the second amended answer is that they are acts of the widow tending to show that the claim now made that her husband was the equitable owner of the land in controversy is not true, and are evidence against her to be considered in connection with the other evidence in the case.

II. For the sake of brevity we will give the substance only of the material facts found by the referee upon which he

recommended a decree for the plaintiffs. It appears therefrom that in 1854 Thomas Donaho purchased of one Stypes one hundred and twenty

2. CONVEY-
ANCE: mis-
take: admin-
istrator.

acres of land, and paid the purchase price, but directed that the conveyance be made to his brother, Allen S. Donaho. The evidence does not show who owned the purchase money of the land, but the two brothers were equally interested in the purchase. The Donaho brothers divided the lands so that Allen S. was to own in severalty that part lying east of the Nodaway river, and Thomas was to own in severalty that part lying west of said stream. The land in controversy is sixteen and seven one-hundredths acres lying west of the river. Thomas Donaho took actual possession of this land in 1856, and held such possession up to the making of the administrator's deed in May, 1868. Allen S. Donaho never made any conveyance of the land in controversy to his brother Thomas. Allen S. died in 1860. In February, 1868, Thomas Donaho was appointed administrator of the estate of his brother Allen. On the same day of his appointment he filed an application in the county court for the sale of the real estate belonging to said estate, including the land in controversy in his petition.

The order of appraisement, and the report of the appraisers, includes the forty acres of which the land in controversy is part, by the government description, with the words "not heretofore sold," and "the unsold part of." (It is proper to say here that while both brothers were living two small parcels were sold and conveyed to defendant). The land was ordered to be sold, and was sold to the defendant.

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The deed made by Thomas Donaho, as administrator, included the land in controversy, and was duly approved by the county court. The defendant knew at the time he purchased the lands and received the administrator's deed that Thomas Donaho claimed some interest personally in the land in controversy in this action. The land is used principally as a wood and timber lot, and it was so used by Thomas Donaho and his representatives, and by the defendant, from the date of the administrator's sale until about January 1, 1874; but the evidence does not show that either party had knowledge that the other party was so using said land to any extent. Thomas Donaho died in November, 1868, and about January, 1874, the defendant ordered one of the plaintiffs off of said land, and since that time the defendant has been in exclusive possession.

To entitle the plaintiffs to a decree as prayed they must establish two propositions: *First*, that Allen S. Donaho held the legal title to the land in trust for his brother, Thomas Donaho; and, *second*, that when Thomas Donaho filed his petition for the sale of the land belonging to his brother's estate, and made the conveyance to the defendant, he included the land in controversy by mistake.

Conceding that the referee was justified from the proven facts in finding that the land was held in trust, but which point we do not determine, there is an entire absence of any evidence justifying the conclusion that there was a mistake in the proceedings in the county court, and in the deed.

True it is found that the defendant had notice that Thomas Donaho "claimed some interest personally" in the land, but this is not sufficient. In the absence of any showing to the contrary we must presume that he intended to do just what he did. If he intended to convey his own land, and did convey it to the defendant, and both parties so understood it, he and his representatives are forever estopped from setting up title against the defendant.

The principles upon which this rule rests are so plain and

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fundamental as to need neither discussion nor the citation of authority for their support.

The cause was tried as a law action in the court below, and upon errors assigned in this court. The decree will be reversed, and cause remanded for a new trial.

REVERSED.

LOMAX ET AL. V. SMYTH & Co. ET AL.

1. **Notes and Bills: DEMAND AND NOTICE.** Where a draft is in the possession of the drawer until after maturity, demand and notice are waived; and the execution of a note for the amount of the draft, with full knowledge that demand has not been made and notice given, removes the effect of the laches, if any there be.
2. **Conveyance: CONSIDERATION: ESTOPPEL.** S., being indebted to plaintiff upon an obligation dated February 3, 1874, and which was past due on September 3, 1874, executed his note for four months at that time, dating it back to the time when the first obligation was executed. At the same time his wife executed deeds to certain real estate, lying in different counties, to secure the payment of the note; and plaintiff at the same time executed a defeasance, thereby agreeing, upon the payment of interest at the end of every six months, and the payment in full of principal and interest at twelve months from the time of the execution of the note, to reconvey: *Held*, that the conveyance by the wife to secure her husband's antecedent debt was sustained by a valid consideration; the acceptance thereof by the plaintiff, and the execution of the defeasance, estopping him from proceeding at once to collect the note. ADAMS, J., *dissenting*.

Appeal from Humboldt District Court.

FRIDAY, DECEMBER 13.

On the 3d day of February, 1874, George B. Smyth & Co., which the evidence shows is in fact George B. Smyth, drew and duly indorsed, in Keokuk, a draft payable to their own order on Cragin & Co., New York city, for twelve thousand dollars, due four months from date. On the same day the estate of B. F. Moody purchased this draft from George

50	223
88	117
50	223
92	564
50	223
106	520
50	223
110	420
50	223
123	197

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B. Smyth & Co., paying therefor eleven thousand five hundred and ninety dollars. The draft was duly accepted by Cragin & Co., payable at Fourth National Bank, New York city. Before the draft matured Cragin & Co. became badly embarrassed, and informed Smyth that they could not meet the draft at maturity. Smyth stated this fact to Hosmer, one of the executors of the estate of B. F. Moody, and, as he was going east, desired the draft, that he might have Cragin & Co. waive protest. On the fifth day of June, the second day of grace, Smyth presented the draft to Cragin & Co., in New York city, and procured their signature to a waiver of protest, as follows: "For value received we hereby waive protest on the within." Upon his return from New York city Smyth returned the draft to Hosmer. He then commenced negotiations for the settlement of the claim, which culminated on the third day of September, 1874, by his executing a promissory note as follows:

"\$12,000.

KEOKUK, February 3, 1874.

"Four months after this date we promise to pay to the order of P. T. Lomax, A. Hosmer, and A. M. Moody, executors of B. F. Moody, deceased, twelve thousand dollars, with interest thereon at the rate of ten per cent per annum from maturity, and payable semi-annually from the 3d of September, 1874.

"GEORGE B. SMYTH & Co."

This note was antedated so as to bear the same date as the draft, and by its terms was due June 3, 1874, although not executed until the 3d of September. At the time of the execution of the note Smyth paid the interest thereon up to September 3, 1874. To secure this note George B. Smyth and his wife, Martha Smyth, executed to P. T. Lomax five separate deeds of land, situated in Humboldt, Emmett, Pocahontas, Plymouth and Sioux counties, amounting in all to about thirty-four hundred acres, the title to all of which was in Martha Smyth. About the same time Lomax executed a defeasance, the material portions of which are as follows:

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"Whereas, the said Lomax now holds the promissory note of George B. Smyth & Co. for the sum of twelve thousand dollars, dated at Keokuk, February 3, 1874, payable four months after date to the order of A. Hosmer, the said Lomax, and A. M. Moody, executors of B. F. Moody, deceased, with interest thereon at the rate of ten per cent per annum from maturity, and payable semi-annually, and which note is now past due and unpaid; and, *whereas*, the said Martha M. Smyth, together with her husband, George B. Smyth, have this day conveyed to the said Lomax the following described real estate situated in the State of Iowa, viz.: * * * * *

"Now, this agreement witnesseth, that upon the payment of the interest which has accrued upon the said note, at the rate of ten per cent per annum, to the 3d day of September, 1874, and the payment thereafter of the interest accruing, at the same rate, and at the end of every six months from the 3d of September, 1874, and the payment in full of said note, principal and interest, at twelve months from and after the 3d of September, 1874, by any of the parties liable thereon, or by the said Martha M. Smyth, or by any person or persons for them, and by the payment by the said Martha M. Smyth, or any person for her, of all taxes, dues and public charges, now due or to become due, in and upon the lands above described, then and thereafter the said Lomax covenants, promises and agrees, to and with the said Martha M. Smyth, to convey to her, by proper deed or deeds, the lands, and all the right, title or interest he may have acquired by virtue of the deeds of the said Martha M. Smyth and George B. Smyth, her husband, to him, the said Lomax, executed and delivered; and in event the said Martha M. Smyth shall desire, during the existence of this agreement, to sell and convey any of the land aforesaid, and to apply any of the proceeds of such sale to the payment, in whole or in part, of the indebtedness hereinbefore described, then the said Lomax, in consideration of the proceeds so to be applied,

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does hereby further covenant, promise and agree, to and with the said Martha M. Smyth, for all such sums of money so realized and applied, that he will, by proper deed or deeds, convey all his right, title and interest in and to said lands, or any parts of the same, to the purchaser or purchasers thereof; and it is further agreed between the said P. Thornton Lomax and the said Martha M. Smyth, and it is the express condition, that in event the said Martha M. Smyth shall fail to pay or cause to be paid the annual taxes, dues and charges, now due or to become due, in and upon the lands above described, and in event that the said taxes, dues and charges are paid by the said Lomax, then that the sum or sums of money so paid by him to discharge and satisfy said taxes, dues and charges shall bear interest at the rate of ten per cent per annum from the date of such payment, and shall, both principal and interest, be secured to be paid to the said Lomax, from the proceeds of lands herein conveyed, in all respects as the principal debt herein first described and secured."

This action is brought to recover the amount of the note and certain taxes paid upon the lands described, and to foreclose the deeds in question as mortgages. The court found for plaintiffs upon the promissory note sued on, the sum of fifteen thousand nine hundred and twenty-nine dollars, and on account of taxes paid upon the lands the sum of one thousand six hundred and six dollars and eleven cents; and decreed that the lands described in the deeds be sold to satisfy said amounts, and that for any part of the said sum of one thousand six hundred and six dollars and eleven cents remaining unsatisfied by a sale of said lands a general execution be awarded against Martha M. Smyth. This decree is dated September 18, 1877. On the 4th of October, 1877, Martha M. Smyth perfected her appeal. On the 1st of December George B. Smyth and George B. Smyth & Co. served notice of appeal. The further material facts appear in the opinion.

Lomax v. Smyth & Co.

Howell & Anderson and J. F. Duncombe, for appellants.

Gillmore & Anderson and P. T. Lomax, for appellees.

DAY, J.—I. The plaintiffs retain the acceptance of Cragin & Co., and have refused to deliver it to the defendants. Upon the part of the defendants it is claimed that the note sued on was given in purchase of the draft in question, and that, because of the refusal of the plaintiffs to surrender the draft, there is a failure of consideration for the execution of the note. Upon the other hand the plaintiffs insist that the note, and the conveyances securing it, were intended merely as collateral security for the draft; that it was never contemplated that the draft should be surrendered; that the security for the note is deemed inadequate for the amount due plaintiffs, and that they rightfully retain possession of the acceptance, hoping to be able to make something out of it if the security shall prove to be inadequate. This branch of the case involves the determination of a question of fact.

We have carefully examined the testimony bearing upon this question, and we unite in holding that the preponderance of the evidence, taking into consideration all the surroundings and the conduct of the parties, sustains the claim of the plaintiffs. The space which would be occupied in our reports by a full review of the evidence bearing upon this branch of the case would not be compensated by the resulting benefits.

II. It is insisted further that, as no demand of payment was made upon the acceptors of the draft, nor notice of non-
1. notes and bills: demand and notice. payment given to George B. Smyth & Co., the drawees and indorsees of the draft, they were discharged from liability thereon, and the note is, therefore, without consideration and cannot be enforced.

Upon the trial of the case the deposition of George B. Smyth was introduced, as follows:

“Previous to the maturity of the draft Cragin & Co. became badly embarrassed, and informed me that they could not

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meet the draft at maturity. I saw Mr. Hosmer, stated that fact to him, and, as I was going east just previous to the maturity of the draft, asked him to let me take the draft with me, and have Cragin & Co. waive protest, and I would return it to him when I returned home, which he did. Cragin & Co. waived protest, and I returned it to him. Then I commenced negotiations for the settlement of the claim, stating to him that I was unable to pay it, and asking him to take a deed for land situated in Humboldt, Pocahontas, Emmett and Plymouth counties, stating that these lands were a part of the land grant to the Des Moines Valley Railroad, by a disinterested party valued at from five dollars and twenty cents to six and one-half dollars per acre. * * * Sometime after making this proposition, I think in September, 1874, Mr. Hosmer consented to it, and said, so far as I recollect, that Mr. Lomax attended to the legal part of the business of the Moody estate, and he would fix the matter up with me."

The evidence further shows that the note and deeds were executed pursuant to this proposition.

There are two reasons why the want of protest and notice cannot now avail:

1. It seems to have been the understanding of both Hosmer and Smyth that protest was necessary in order to bind the acceptors, Cragin & Co. Under this impression Smyth obtained possession of the draft, a short time before its maturity, for the purpose of procuring a waiver of protest from Cragin & Co. The draft matured on the 6th day of June. The waiver of protest is dated the 5th day of June. The writing, except the signature, is shown to be that of Smyth. He then had the draft in his possession in New York, on the day before it matured, and he handed it back to Hosmer when he returned to Keokuk. He had the draft in his possession when it matured, and thus deprived the holders of the power to present it for payment on the day when it matured. "Where an indorser obtains possession of the note before maturity, and withholds it until after that time, demand and

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notice are waived." 1 Parsons on Notes and Bills, 584; *Havens v. Talbot*, 11 Ind., 323.

2. It very clearly appears that Smyth, with full knowledge that there had been no demand of payment, nor notice of non-payment, after the draft matured, entered into negotiations for the settlement of the claim, which finally resulted in the execution of the note sued on. It is very clear that this constitutes a waiver of notice.

In Parsons on Notes and Bills, p. 595, it is said: "The general principle seems now to be settled, in this country, at least, and by the earlier decisions in England, that, where no demand has been made or notice given, a promise to pay, after maturity, made with full knowledge of laches, is binding upon the party promising, and removes entirely the effect of any negligence in making the demand or in giving the notice." See numerous authorities cited in note. See, also, to the same effect, *Creshire v. Taylor*, 29 Iowa, 492; *Hughes v. Bowen*, 15 Iowa, 446; *Allen v. Harrah*, 30 Iowa, 363. In addition to all this the affidavit of Smyth appears in the case, filed May 8, 1876, in which he says that "Cragin & Co. did not pay the bill at maturity, and, by consent of all parties, a waiver of protest was entered upon said bill." Under all the circumstances disclosed the want of protest cannot avail as a defense.

III. On the 9th day of December, 1876, the answer of defendant was filed, which, among other things, alleges that the draft was never protested as against the said Smyth. The replication to this answer, filed on the 7th day of March, 1877, is a mere denial. On the 17th day of March, 1877, and at the term at which the cause was tried, the plaintiffs filed an amended replication, admitting that said draft on Cragin & Co. was not protested, but averring that said Smyth & Co., with full knowledge of the same and the facts, waived protest, to-wit: demand and notice, and promised to pay said draft, and that said draft was in possession of Smyth & Co. at maturity. A motion for a continuance was made upon the

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ground that this replication tendered a new issue, which the defendants were not prepared to meet. This motion was overruled. It is claimed that the defendants were thus compelled to go to trial upon an issue respecting which they had no opportunity to procure evidence, and that they have been greatly prejudiced by this action of the court. The deposition of George B. Smyth was taken and filed in the cause March 13th, before this amended replication was filed. In this deposition he distinctly admits all the facts alleged in this amendment. The amendment does no more than conform the issues to the facts already proved in the case. It is not apparent how the defendants could possibly have sustained any real prejudice from the ruling of the court.

IV. The main question in this case remains to be considered. It is this: Was there any consideration for the conveyance by Martha M. Smyth of her lands as security for her husband's antecedent debt? It is maintained by appellant that, "where one person owes another a sum of money, and afterward a third person is induced to secure or guarantee the payment of the debt, either by promising to pay it, or by pledging or mortgaging his property therefor, in order to support such subsequent undertaking of such third person there must be some further consideration shown than the original debt, for the consideration of the original debt will not attach to such subsequent contract." Appellee's counsel admit the correctness of this proposition of law. They contend, however, that there was a valid agreement to extend the time of payment of the debt owing by George B. Smyth, which would, as appellant admits, if established by the evidence, constitute a sufficient consideration to support the conveyances of Martha M. Smyth. Does the evidence, then, establish a valid and enforceable agreement for such extension?

The draft matured on the 6th day of June, 1874. It was long past due when the note and deeds were executed, on the 3d day of September, 1874. The note on that day was exe-

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cutted, bearing date February 3, 1874, and payable four months after date, or three months before the day it was in fact executed. It was impossible that the note should be paid upon the day upon which, by its terms, it appeared to be due. The parties could not have intended such payment. The stipulation as to time of payment is entirely nugatory, because impossible of performance, and must be eliminated from the note. See *Hall v. Cazenove*, 4 East. R., 477. The note, then, in effect becomes one payable on demand at any time after its actual execution, September 3, 1874: The note, the deeds and the defeasance constitute parts of one transaction, and must be construed together as forming one contract. The plaintiff demanded security. The defendants proposed to give security. This was effected by the execution of absolute deeds and a defeasance. Having incurred the inconvenience and expense of executing the security, the defendants were entitled to whatever benefits resulted to them on account of the security. The defeasance recites: "Upon the payment of the interest which has accrued upon the said note, at the rate of ten per cent per annum, to the 3d day of September, 1874, and the payment thereafter of the interest accruing at the same rate, and at the end of every six months from the 3d of September, 1874, and the payment in full of said note, principal and interest, at twelve months from and after the 3d day of September, 1874, * * * then and thereafter the said Lomax agrees to convey," etc.

It is clear that this gives the defendants the privilege of paying the principal of said note within twelve months from the 3d day of September, 1874, or within one year from the time of its actual execution.

It is true Lomax does not expressly agree that he will not proceed to collect the note at once, but he does, in consideration of the deeds executed to him, agree in effect that payment of the note may be made at any time within twelve months from its execution. By the acceptance of these deeds and the execution of the defeasance Lomax estopped himself

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and the plaintiffs from the right to proceed at once to the enforcement of the note; and if they had undertaken to enforce it they might have been prevented by injunction. There was, as we think, at the time the security was given, a valid agreement for the extension of the time of the payment of the debt.

V. It is claimed that, because the deeds are distinct, the court had no jurisdiction to foreclose except as to the lands situated in Humboldt county, where the action was commenced. The deeds, in connection with the defeasance, constitute one mortgage to secure the note sued on. The action to foreclose was properly brought in the county where some of the property was situated. Code, § 2578.

VI. The court decreed that for any balance of the judgment on account of the payment of taxes, which should remain unsatisfied after exhausting the lands deeded as security, a general execution should issue against Martha M. Smyth. The defeasance, respecting the taxes upon the land, contains the following provision:

“And it is further agreed between the said P. Thornton Lomax and the said Martha M. Smyth, and it is the express condition, that in event the said Martha M. Smyth shall fail to pay or cause to be paid the annual taxes, dues and charges now due or to become due in and upon the lands above described, and in event that the said taxes, dues and charges are paid by the said Lomax, then that the sum or sums of money so paid by him to discharge and satisfy said taxes, dues and charges shall bear interest at the rate of ten per cent per annum from the date of such payment, and shall, both principal and interest, be secured to be paid to the said Lomax from the proceeds of lands herein conveyed, in all respects as the principal debt herein first described and secured”.

It is urged by appellee that the taxes constituted a debt chargeable against Martha M. Smyth; that this recital in the defeasance operates as a mortgage upon the lands in ques-

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tion to secure this debt; and, as there is no stipulation to the contrary, after exhausting the mortgaged property a general execution may issue. It is true that, as respects the county, Martha M. Smyth may be liable to answer for these taxes out of her general property; but, we think, she assumed to the plaintiffs no obligation to do so. The taxes upon her real estate constitute a lien paramount to any lien which the plaintiffs acquired. By pledging her lands for the payment of her husband's debts she assumed no personal obligation to keep the lands free from liens which might attach from delinquent taxes. The defeasance goes no further than to provide that taxes paid by Lomax should be secured from the proceeds of the lands, in all respects as the principal debt was secured. We think the court erred in awarding a general execution against Martha M. Smyth. In this respect the decree will be corrected in the court below or in this court, as plaintiffs may elect.

As thus modified the judgment is

AFFIRMED.

ADAMS, J., *dissenting*.—I think that there was no consideration for the deeds executed by Martha M. Smyth. The appellees contend that they were given in consideration of an agreement to extend George B. Smyth's note; but the note was executed at the same time that the deeds were made. It is not allowable to show that a note made by its own terms payable on demand, was, by a contemporaneous parol agreement, payable on time.

Furthermore, there is no evidence of such agreement. The opinion concedes that there was no expressed agreement, but it holds that the plaintiffs are estopped from saying that there was no agreement. The consideration, then, according to the opinion, is not the agreement but the estoppel.

Conceding, for the present, that an estoppel arising from the acceptance of a deed could become a consideration for the deed, I am unable to conclude that any estoppel arose. Where

Lewis v. Chickasaw County.

a third person gives a mortgage to secure a demand note, and it is provided in the mortgage that it shall not be foreclosed within a specified time, the right to enforce the note immediately against the maker is perfectly consistent with the terms of the mortgage; and if the note and mortgage are executed at the same time, the note must be regarded as immediately enforceable.

It may be true that the maker of the note in this case procured Martha M. Smyth to give the security. The argument is that he must have expected some benefit from it. He doubtless hoped for more indulgence, but I am unwilling to hold that he became entitled to an extension in the absence of an agreement to that effect, and especially as he gave a demand note (or what is equivalent to it) which would exclude such agreement if made by parol and contemporaneously.

Besides, I do not think that the consideration of a deed can grow out of a deed. The theory of the opinion is that the deeds are void because the plaintiffs were estopped by receiving them. But they were not estopped if the deeds are void. It is necessary to assume their validity to create the estoppel.

LEWIS V. CHICKASAW COUNTY.

1. **Mechanic's Lien: COUNTY BUILDING.** A mechanic's lien cannot be established against a building owned by a county and used for county purposes.

Appeal from Chickasaw District Court.

FRIDAY, DECEMBER 13.

ACTION to establish a mechanic's lien. The petition shows that the defendant county entered into a contract with certain persons to erect a building for county purposes; that the contractors employed the plaintiff to furnish the brick for the building; that the plaintiff furnished the brick, and that

The First National Bank of Muscatine v. Krance.

the contractors are indebted to him therefor in the sum of two hundred and fifty-eight dollars and fifty cents. The petition also shows that the plaintiff has taken all the steps necessary to establish his mechanic's lien upon the building as a sub-contractor, and has a mechanic's lien upon the building, providing a mechanic's lien can be established against a building owned and held by the county for county purposes. The defendant demurred to the petition, and the demurrer was sustained. Plaintiff appeals.

Hiram Shaver, for appellant.

H. H. Potter, for appellee.

ADAMS, J.—Under the rule held in *Loring & Co. v. Small et al.*, 271, *post*, decided at the present term, a mechanic's lien cannot be established against a building owned by a county and used for county purposes. The demurrer, therefore, was properly sustained.

AFFIRMED.

THE FIRST NATIONAL BANK OF MUSCATINE V. KRANCE ET AL.

1. **Venue: JURISDICTION: PRACTICE.** Where, upon a default being set aside, the defendants were required to answer in twenty days, and after that time had elapsed moved for an order for change of place of trial on the ground that they were residents of another county, *held*, that upon default being a second time obtained they were not entitled to relief.
2. **Practice: ATTORNEY'S FEE: EVIDENCE.** Where a note provides for a reasonable amount for attorney's fee, it is erroneous for the court to fix and render judgment for an amount without evidence by which to determine it.

50	285
82	285

Appeal from Butler District Court.

FRIDAY, DECEMBER 13.

ACTION upon a promissory note. The defendants were defaulted, and afterward, on the 12th day of September,

The First National Bank of Muscatine v. Krance.

1877, the default was set aside and the defendants required to answer in twenty days. On the 7th day of May, 1878, the defendants moved for an order for change of place of trial to Grundy county, upon the ground that the defendants were residents of that county. On the 9th day of May, 1878, no answer being yet filed, the plaintiff moved for default, and on the same day the court granted the motion for default, and overruled the motion for change of place of trial. The plaintiff then offered in evidence the note, which provided that a reasonable amount should be allowed as attorney fees, and the record shows that the note and attorney fees were allowed without any other evidence than the note sued on, but what amount was allowed as attorney fees is not shown. Judgment for plaintiff. Defendants appeal.

J. H. Scales, for appellants.

Fred. Gilman, for appellee.

ADAMS, J.—I. Section 2589 of the Code provides that “if a suit be brought in the wrong county it may there be prosecuted to a termination unless the defendants, before answer, demand a change of place of trial to the proper county.” One design of the provision requiring applications to be made before answer doubtless is to give the plaintiff as speedy a trial as can be given him consistently with the error which he has made. In this case, default having been made, it was proper for the court, in setting it aside, to prescribe that the defendants should answer in twenty days. If they desired to change the place of trial they had twenty days in which to make the application, and we think that they could not properly claim more than that. The court might have ruled that they should answer *instanter*, but they obtained twenty days, which, in all probability, extended beyond the term, or at least such might be the fact, and we think that they should not be allowed to take advantage of

1. VENUE: jurisdiction: practice.

 Peschongs v. Mueller.

the indulgence of the court after having been once in default, and their own laches, to gain more time.

II. The defendants complain of the allowance of attorney's fees without evidence. In this we think the court erred. We discover no other error.

2. PRACTICE:
attorney's
fee: evidence.

REVERSED.

50 237
107 12

 PESCHONGS V. MUELLER.

1. Fences: DIVISION LINES: DAMAGES. The action of fence viewers in locating and apportioning division lines of fence is not conclusive, and it is competent for a land owner to show, in a proper action, that a fence was located upon his land, and not upon the division line, and he may recover damages therefor.

Appeal from Dubuque Circuit Court.

FRIDAY, DECEMBER 13.

ACTION to recover the value of the part of a partition fence allotted by the township trustees to defendant, to build and keep in repair, which he failed to build, and which was constructed by plaintiff. The fence divided the lands of the parties to the suit.

The answer admits the action of the trustees in regard to the fence, and that defendant had notice thereof, but avers that defendant was required thereby to build the fence, not on the division line, but wholly upon his own land, and that plaintiff built the fence on defendant's land and not on the division line. The answer pleads a counter-claim for damages sustained on account of the building of the fence on defendant's land, for trees cut down, etc. There was a verdict and judgment for defendant in the sum of ten dollars. Plaintiff appeals.

Peschongs v. Mueller.

Fouke & Lyon, for appellant.

H. G. Wullweber and Pollock & Shields, for appellee.

BECK, J.—I. There was a dispute between the parties involving the division line of their lands when the fence was built. 1. FENCES: division lines: damages. A survey had been made by one Koob—not the county surveyor—and the line was located by him upon what defendant claimed to be his land. Thereupon the township trustees required defendant to build the partition fence upon the division line as established by Koob. Defendant refused compliance, and the plaintiff built the fence upon that line and brought this action to recover for building the part of the fence allotted to defendant.

The court below held that the decision of the trustees adopting the division line run by Koob was not conclusive as between the parties, but that it was competent for defendant in this case to show the true division line to be other and different, and if the jury should so find, and that the fence in question was not built on the true division line, plaintiff cannot recover, and defendant is entitled to recover the damages sustained by him on account of trees cut down and the loss of the use of a well upon the strip of land in controversy. Instructions were given and refused, and evidence admitted by the court in harmony with this ruling, which presents the main question in the case.

We are of the opinion that the views of the court below upon the question of law here presented are correct.

The township trustees, acting as fence viewers, are clothed with no authority to establish or adjudicate upon division lines. Their jurisdiction is limited to matters involving the obligation of adjoining owners to erect and maintain partition fences; the assignment to each his share of the fence to be built and maintained; the prescribing of time within which it shall be built, and in case of failure to build, and the building by the other party, the ascertaining and certifying of the

value of the fence, etc. Code, §§ 1492, 1490, 1491. The statute provides other proceedings for establishing division lines. Acts Fifteenth General Assembly, chapter 8. Actions are authorized by the law for that purpose. Proceedings of fence viewers, in matters within their jurisdiction, do not bar legal proceedings which involve division lines of lands. Code, § 1506; *Bills v. Belknap*, 38 Iowa, 225.

As the establishing or determination of the division line between the parties is a matter not within the jurisdiction of the trustees, when acting as fence viewers, their action was not binding upon defendant, and final. It was competent for him to show the true line, and that the fence built by plaintiff was not upon it.

II. A witness for plaintiff, in rebuttal, was asked what one of the surveyors, who had run the line for defendant, had said about a certain tree, while doing the work. An objection to the question was sustained. Thereupon defendant offered to recall the surveyor, who had before testified for defendant, and ask him what he did say to this witness. This was not permitted, and is complained of as error. What the surveyor said to the witness was not competent as original evidence in defendant's behalf. If the defendant had the purpose of obtaining the surveyor's statement of his conversation in order to contradict and thus impeach him, that course would not be proper under all circumstances. A party cannot in all cases, if he may in any, recall a witness who has before testified, for the purpose of laying the foundation for impeachment by contradicting his testimony. A state of facts should exist which authorizes such a course; but no such facts are shown in this case, and, therefore, it does not appear that the court erred in the ruling in question.

III. A surveyor testified that the sections on the north line of a township are usually fractional. The evidence was introduced against plaintiff's objection, and is now complained of as error. The fact testified to by the witness may have aided the jury in determining the true line of the land. No

Robinson v. The City of Burlington.

reason for holding the evidence to be incompetent is given by counsel; 'we can discover none.

IV. The plaintiff asked a witness, introduced by him, to state how one line of the land compared with another. The court would not permit the question to be answered. Of this ruling plaintiff complains. Counsel do not give any other reason in support of the competency of the evidence than that it would have tended to show that the line in question, run by Koob, was correct. This, probably, would be true, if the line taken as the standard in the comparison had been shown to be correct, which, however, was not done. We think the ruling upon the evidence is not shown to be erroneous.

V. It is insisted that some of the instructions are misleading on account of want of clearness, and others are not applicable to the evidence, or are upon points not shown at all by the evidence. We think these objections are without foundation.

VI. It is lastly insisted that the verdict is wanting in support from the evidence. We think otherwise. The jury were justified in finding that the fence in question was not built on the true line of the land.

Other objections made in the assignment of errors are not urged in argument. They are considered as waived.

AFFIRMED.

ROBINSON V. THE CITY OF BURLINGTON.

1. **Municipal Corporation: IMPROVEMENT OF STREETS: ASSESSMENT.** Where the plaintiff sought to recover of a city under an ordinance requiring the city to refund taxes erroneously levied, it was *held* that the fact that plaintiff saw the improvement, for which the tax was levied, being made without protest, would not estop him to deny the validity of the assessment, it not appearing that he knew it was the intention to assess adjacent property for its cost; nor would the fact that he paid the first instalment of the tax without protest preclude a recovery, a protest not being required by the terms of the ordinance.

50	240
88	295

50	240
126	510

50	240
138	324

Robinson v. The City of Burlington.

Appeal from Des Moines District Court.

FRIDAY, DECEMBER 13.

ACTION to recover the amount of a special assessment alleged to have been wrongfully collected from the plaintiff by the defendant. The special assessment was made for the cost of improving a street in front of the plaintiff's property. The alleged invalidity is based upon the fact that the resolution ordering the improvement did not direct that the cost should be assessed upon the lots fronting on the street improved, as should have been done, according to the ordinance under which the resolution was passed. The defendant denies that the assessment was invalid, and avers that if invalid the work was done with the plaintiff's knowledge and consent, and that he is estopped from denying the validity of the assessment, and furthermore that the plaintiff paid the assessment without protest. There was a trial without a jury, and judgment for the defendant. Plaintiff appeals.

Hall & Baldwin, for appellant.

C. L. Poor, for appellee.

ADAMS, J.—That the assessment was irregular and invalid we think there is no doubt. Counsel for the defendant do not contend that it was not. But they say that the plaintiff ought not to recover because he saw the improvement while being made, and made no objection thereto. If such is the fact, and the plaintiff knew that it was the intention of the council to assess the cost upon abutting lots, it appears to us that he should be regarded as estopped. *Weber v. San Francisco*, 1 Cal., 455; *Kellogg v. Ely*, 15 Ohio State, 64. It is insisted by the plaintiff that this cannot be so, because he had no power to enjoin the improvement. It may be true that the city had the right to make the improvement if it saw fit, and that the plaintiff could not

1. MUNICIPAL
corporation:
improvement
of streets: as-
sessment.

Robinson v. The City of Burlington.

enjoin it, but it does not follow that he should not have objected to the work being done at the expense of his lot after he understood that it was the intention of the council that it should be so done. The work was for his special benefit. It was an improvement to his lot, and not the less so because a general benefit accrued to the public. It is upon the theory of a special benefit that a special assessment is allowable. When, therefore, a lot owner sees work done with knowledge that a special assessment is to be made, and does not object, it appears to us that he should not be heard to question the regularity of the assessment.

The plaintiff insists, however, that he did object. He insists that he paid under protest, and that that is sufficient. If he made a payment under protest, before the completion of the work, such protest we think might be deemed sufficient objection to the further prosecution of the work at the expense of his lot. What, then, is the fact as to payment under protest? The evidence upon the point is conflicting, and the judgment of the court must be assumed to be correct so far as this point is concerned. It seems to be undisputed that some objection to the work was communicated to the contractor, but that was not a communication to the city.

Holding, then, that the lot was properly chargeable for work done without the plaintiff's objection, after he had knowledge that it was the intention of the council to assess it, we have to inquire when he obtained such knowledge. He did not obtain it from the resolution by which the work was ordered, for that, as we have seen, did not provide for the assessment of the cost upon the abutting lots. The only evidence as to when he obtained the knowledge is the testimony of the plaintiff himself. He says: "The first I was aware the improvement was being made by special assessment was in December, 1871, when the authorities presented a bill for the first assessment." Prior to that time the plaintiff cannot be said to have consented to the work being done at the expense of his lot. The first bill, it appears, was for twenty-four dollars and thirteen

Robinson v. The City of Burlington.

cents. To that the plaintiff's want of objection to the work cannot be said to apply. Is he, then, entitled to recover that amount? He did not, as we have seen, pay it under protest. At least, under the evidence and judgment of the court we must assume that he did not. The defendant insists that this fact must preclude a recovery.

The plaintiff relies upon section 24, title 32, Revised Ordinances, which is as follows: "In all cases when any person shall pay any taxes, interest or cost, or any portion thereof, that shall hereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, or to clerical or other errors or irregularities, the city council shall, upon being satisfied of such error, direct the treasurer to refund the same to the tax payer."

It is not expressly provided that an illegal tax shall be refunded only in case it is paid under protest, and we see no reason for grafting such a provision upon the ordinance by construction. The only doubtful question is as to whether the word *taxes*, as therein used, should be construed as covering special assessments. As showing that it should not, the defendant cites Dillon on Municipal Corporations, §§ 599 and 602, and Cooley on Taxation, 147. This court, however, has already given a construction to the ordinance in a case where the legality of the same assessment was involved. *Tallant v. The City of Burlington*, 39 Iowa, 543. It appears to us, then, that the plaintiff is entitled to recover at least the amount of the bill first paid. For error in disallowing it the case is

REVERSED.

Will of Gustav L. F. Overdieck.

WILL OF GUSTAV L. F. OVERDIECK.

50	244
121	426

1. **Descent:** INHERITANCE FROM CHILD. The widow of a deceased husband will not inherit from the child who died before the death of the husband. Following *McMenomy v. McMenomy*, 22 Iowa, 148.

Appeal from Scott Circuit Court.

FRIDAY, DECEMBER 13.

GUSTAV L. F. OVERDIECK made his will as follows:

"Know all whom it may concern, that Gustav L. F. Overdieck, of the county of Scott, and State of Iowa, being of sound and disposing mind and memory, do hereby publish and declare the following to be my last will and testament:

"1. It is my will that my just debts and funeral expenses shall be paid out of my estate, as soon after my death as it can be lawfully done.

"2. For the reason that I am satisfied with the provisions of the laws of the State of Iowa, in regard to the wives of decedents, I do not make herein a special bequest to my wife; but I do hereby express my will that my beloved wife, Elise, shall receive of my estate after my death all such share which the laws of said State of Iowa now give her, no more and no less.

"3. I do hereby devise and bequeath to my beloved son Friedrich the sum of three thousand (\$3,000) dollars; and to my two daughters Charlotte and Ellen the sum of three hundred (\$300) dollars each, to be paid to them as soon after my death as my executors, herein below named, can lawfully do it, without thereby wasting, depreciating, sacrificing or unnecessarily incumbering said property.

"4. All the rest and residue of my estate, personal, real or mixed, of any kind, without any exception, I do hereby devise and bequeath to my beloved son Albert, who is of weak mind, and for whom it is my desire that my friends Gustav Schlegel

Will of Gustav L. F. Overdieck.

and Martin Plahn shall be appointed guardians, and receive this legacy in trust for him.

"5. I do hereby nominate and appoint as executors of this my last will and testament, Gustav Schlegel, of Davenport, Iowa, and Martin Plahn, now living near Walnut, Iowa; and I do hereby especially exempt them from the necessity of giving bonds for such trust."

The devisee, Friedrich Overdieck, died intestate, unmarried, and without issue, November 21, 1876, leaving surviving him, as next of kin, said testator, his father, and said legatees, Elise, his mother, Albert, his brother, and Charlotte and Ellen, his sisters, all of whom, except said testator, are still living. The testator, Gustav L. F. Overdieck, died March 29, 1877, and his will was thereafter duly admitted to probate in said Circuit Court, and Gustav Schlegel qualified as sole executor.

On November 7, 1877, the executor filed a petition for the construction of the will, making all the legatees defendants, and stating that he is advised that, under section 2337 of the Code, the amount devised to said Friedrich Overdieck would go to his mother, Elise Overdieck, as his sole heir, unless, from the terms of the will of said Gustav L. F. Overdieck, a contrary intent is manifest; that petitioner is uncertain to whom he should pay said legacy to Friedrich Overdieck—whether to the widow, or to Albert, the residuary legatee. He prays the court to inquire into the matter, and direct him to whom he shall pay said legacy.

Albert Overdieck, by his *guardian ad litem*, answered, claiming the legacy as residuary legatee. Elise Overdieck also answered, claiming said legacy as sole surviving parent and heir at law of the devisee, Friedrich Overdieck.

The court made the following order: "That it is the true construction of said will that said Elise Overdieck does not inherit any portion of the legacy bequeathed to said Friedrich Overdieck, who died before the death of the testator, his father; that she is not the heir of said Friedrich, so that she

Will of Gustav L. F. Overdieck.

can inherit any portion of said legacy, and that it is manifest from the terms of said will that the testator did not intend thereby that she should take said legacy in the event that said Friedrich should die before the testator's death; that the said legacy has lapsed, and has become a part of the residuary estate of the said Gustav L. F. Overdieck, deceased. And the said executor is ordered and directed to treat said legacy of three thousand dollars as a part of the residue of the estate, and to pay and dispose of it accordingly."

To this order Elise Overdieck excepted, and she now appeals.

Claussen & Heinz, for appellant.

E. E. Cook, guardian ad litem, for appellee.

DAY, J.—The widow, Elise Overdieck, claims that she is entitled to the amount devised to Friedrich Overdieck, under section 2337 of the Code, which is as follows: "If a devisee die before the testator, his heirs shall inherit the amount so devised to him, unless, from the terms of the will, a contrary intent is manifest." The corresponding section, 2454 of the Code, 2437 of the Revision, respecting the disposition of the property of *intestates*, is as follows: "If any one of his children be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents." This section received construction in *McMenomy v. McMenomy*, 22 Iowa, 148. It is there held that this section does not authorize the widow of a deceased husband to inherit from their child who died before the death of the husband. This construction was followed at the present term. See *Journell v. Leighton*, 49 Iowa, 601. The purpose of the two sections is evidently the same, and it is not possible, with any consistency, to place upon them a different construction. That the construction placed upon the statute in *McMenomy v. McMenomy* meets the legislative approval, may be fairly inferred from the fact that, although the decision was announced eleven years ago, no declaration of a dif-

Judd & Co. v. Day Brothers.

ferent purpose has been declared by alteration or amendment of the law. As was said in *Journell v. Leighton*, the construction adopted in *McMenomy v. McMenomy* establishes a rule of property, and cannot now, without great confusion and perhaps positive wrong, be departed from. The construction placed upon section 2454 of the Code, and which we cannot now consistently change, even if doubtful of its correctness, logically and necessarily leads to the holding that under section 2337 of the Code a widow of a deceased husband cannot inherit from their child who died before the death of the husband. If the word "heirs" is properly limited to children in one section, it must be so limited in the other. The construction placed by the court below upon the will, in view of prior decisions of this court, is correct.

AFFIRMED.

JUDD & CO. V. DAY BROTHERS.

1. **Contract: OFFER: VENDOR AND VENDEE.** An offer to sell upon certain conditions with respect to price and warranty, unless otherwise specified or withdrawn, is to be deemed a continuing one for a reasonable time.

Appeal from Winneshiek District Court.

FRIDAY, DECEMBER 13.

ACTION on two accepted drafts. The answer alleged the drafts were given for certain shingles sold by plaintiffs to the defendants, which were warranted to be of *A* brand, or first quality; that the same were of an inferior quality, and by reason thereof the defendants are damaged in the sum of two hundred dollars, which they ask to have set off against plaintiffs' claim on the drafts. There was a reply denying the allegations of the answer, and a trial to the court. There was a finding that the defendants were entitled to eighty-nine dol-

50	247
91	112
50	247
138	592

Judd & Co. v. Day Brothers.

lars and thirty-five cents, by reason of the matters alleged in the answer, and judgment was rendered for the plaintiffs for the amount due, after deducting the sum aforesaid, and also against the defendants for costs. Both parties appeal.

M. P. Hathaway, for plaintiffs.

Adams & Bullis, for defendants.

SEEVERS, J.—I. Counsel claim on the plaintiffs' appeal there are two questions for determination, which are—"First, 1. CONTRACT: was there a warranty shown by the admitted offer: vendor and vendee. facts? and, second, was there a breach?" To these only will our attention be directed. As to the last proposition the evidence was conflicting; but we think the preponderance was with the defendants. At least there was evidence to justify the finding.

As to the sale and warranty the material evidence is in writing, the business having been conducted by correspondence. The defendants wrote the plaintiffs as follows:

"DECORAH, IOWA, January 28, 1876.

"GENTS: We wish to buy three hundred to five hundred thousand good *A* shingles, and will give our acceptance, ninety days, drawing ten per cent interest, for them, at two dollars and fifty cents per thousand, on cars in Milwaukee. We have been offered them at that price in Milwaukee, but we don't know the party, and would prefer to buy from you."

To this plaintiffs replied as follows:

"MILWAUKEE, January 31, 1876.

"GENTS: Yours of 28th instant is at hand. In reply we will sell you three to five hundred thousand *A* shingles on your terms, but will have to give you new shingles. We cannot furnish *dry*, first-class *A* for less than two dollars and seventy-five cents. Our new shingles are very good."

It is said that up to this point no contract of purchase and sale was entered into. This, we think, must be conceded.

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There was an offer but no acceptance. The offer, however, was in the nature of a continuing one, and stood good for at least a reasonable time, unless withdrawn. 1 Parsons on Contracts, 483. The offer made by the plaintiffs, in their letter of January 31, 1876, never was withdrawn.

Afterward the defendants wrote the plaintiffs as follows:

“DECORAH, IOWA, February 12, 1876.

“GENTS: Sanger, R. & Co. will be shipping some cars soon which will have about five thousand feet dry flooring in. You can put in as many of your best brand of green *A* shingles into each car as possible. * * * Also send one car of shingles here, half green and half dry * *.”

And from time to time thereafter the defendants directed shingles to be shipped them. The shingles were billed at the prices named in the letter of January 31. If the plaintiffs did not intend to comply with the offer made in their letter they should have so notified the defendants upon the reception of the first or some of the subsequent orders. In the absence of their so doing the defendants had the right to understand they were getting the kind and quality of shingles at the price named in the letter aforesaid. Both parties, we think, must have so understood. As the shingles were of an inferior quality the defendants are entitled to such damages as they have sustained.

II. As to the defendants' appeal. The answer, in effect, pleaded a counter-claim, and the defendants moved the court to re-tax the costs, and that the costs incurred by reason of the issue on the counter-claim be taxed to the plaintiffs. This motion was overruled. It should have been sustained. *Hall v. Clayton*, 42 Iowa, 526.

On the plaintiffs' appeal the judgment below is affirmed, and on the defendants' appeal,

REVERSED.

THE MIHILLS MANUFACTURING CO. v. DAY BROTHERS ET AL.

50	250
86	268
50	250
99	246
50	350
108	537
50	250
117	136
50	250
120	323

1. **Contract: BREACH OF: DAMAGES.** The damages recoverable for a breach of contract are such as may reasonably be considered to have arisen naturally from such breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.
2. **——: SALE.** If the vendor believes in good faith, or has reasonable grounds for believing, that the vendee is in embarrassed or failing circumstances, he has the right to demand the cash, or reasonable security, before delivering the goods, even if the course of dealing between the parties were otherwise with respect to time of payment.

Appeal from Winneshiek Circuit Court.

FRIDAY, DECEMBER 13.

ACTION on two accepted drafts and an account. The defendants pleaded a counter-claim. There was a trial by jury, verdict and judgment for defendants. The plaintiff appeals.

M. P. Hathaway, for appellant.

G. W. Adams, for appellees.

SEEVERS, J.—The counter-claim was based on the following facts: The defendants were dealers in lumber, doors and window-sash, at Decorah and Cresco, Iowa. The plaintiff was a manufacturer of the latter articles at Fond du Lac, Wisconsin.

The defendants ordered of the plaintiff certain doors and window-sash, which they wrote the plaintiff they desired to have “shipped about 20th of September, 1876.” The plaintiff undertook to fill the order and have the same ready “about the 20th of September.”

Nothing was said at the time the order was made, or in defendant’s acceptance of the same, as to whether the goods aforesaid were to be paid for on delivery or before they were

The Mihills Manufacturing Co. v. Day Brothers.

shipped, or whether credit was to be extended therefor. The evidence tended to show that during the month of September the plaintiff became possessed of information tending to show that the defendants were in embarrassed circumstances, and on October 2d plaintiff wrote defendants that in consequence of such information the goods would not be shipped unless paid for on delivery or security given therefor. In reply the defendants wrote plaintiff to return all orders not filled so that they could know "what stuff we must order elsewhere." The plaintiff complied with this request.

One Strother was building a hotel at Cresco, and the defendants had contracted to furnish the doors and window-sash therefor, and those ordered of plaintiff were intended for such building. The defendants had agreed to furnish said articles by the 20th of September, and it was claimed because of the plaintiff's failure Strother was unable to finish the hotel as early as he otherwise would, and that he had been put to some additional expense. For such expense and damages caused by the delay in finishing the building it was claimed that the defendants were bound to indemnify Strother, and that the plaintiff was, therefore, liable to them for such amount, and evidence was introduced tending to show the amount of the damages.

I. The court instructed the jury as follows:

"6. The defendants say that a part of the damage which they have sustained in consequence of the alleged breach of contract on the part of plaintiff is that they (defendants), as lumber dealers, had contracted with one Strother to furnish the goods in question for a certain hotel at Cresco, then in process of construction, and that the goods were ordered of plaintiff to fill the contract with Strother, and they say that in consequence of the failure of plaintiff to furnish the goods the said Strother sustained damages for which defendants are liable; and if you find such to be the facts, and that the plaintiff knew the goods were ordered for use on a particular building, then they are liable for such damage, and

1. CONTRACT:
breach of:
damages.

The Mihills Manufacturing Co. v. Day Brothers.

in addition thereto the additional cost of procuring the goods from others."

In *Hadley v. Baxendall*, 25 E. L. & E., 398, Alderson, Baron, said: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." This has been regarded as a leading case in both England and this country. It has been cited with approval and followed in numerous adjudicated cases, among which are *Adams Express Co. v. Egbert*, 36 Pa. St., 360; *Wolf v. Studebaker*, 65 Id., 459; *Griffin v. Colver*, 16 N. Y., 489; *Hamilton v. McPherson*, 28 Id., 72; *Richardson v. Chynoweth*, 26 Wis., 656; *Ashe v. De Rossett*, 5 Jones (N. C.), 299; *Calvert v. McFadden*, 13 Texas, 240.

In the case at bar there was nothing tending to show that the time of performance was deemed material. That is to say, time was not of the essence of the contract, but the contrary clearly appeared. The plaintiff may have had reason to suppose, from the character of the order, that the defendants intended to use the doors and window-sash in a particular building; but there was no evidence tending to show that the plaintiff knew they were intended for the "Strother Hotel," or that defendants were bound to deliver the same at any definite time. Nor did the plaintiff agree to have the same ready by a day certain.

In making the contract the plaintiff had no reason to suppose it would be responsible for a month's rent of the hotel if the doors, etc., were not furnished by September 20th, if thereby a month's delay in finishing the building occurred, or because additional expense was incurred in temporarily closing the openings in said building.

The Mihills Manufacturing Co. v. Day Brothers.

If the plaintiff had been informed of the special circumstances, and the consequences likely to arise from a failure to furnish the goods by the time indicated, the contract might never have been entered into. The damages sought to be recovered were not such as naturally and usually follow the breach of the contract, and were not contemplated by the plaintiff at the time, and are not, therefore, recoverable in this action.

II. It may be that according to the course of dealing between the parties the defendants had the right to suppose these particular goods were not to be paid for on
2. ———: sale. delivery, but that a credit was to be extended therefor. This was a question for the jury; but, conceding such to be the case, we are of the opinion, if the plaintiff in good faith believed, and had reasonable grounds to believe, the defendants were in embarrassed or failing circumstances, that the plaintiff had the right to demand the cash or security before delivering the goods; and if defendants were informed of such refusal within a reasonable time, taking into consideration all the circumstances, they are not entitled to recover for this reason.

Besides which it was, to use no stronger term, a question for the jury whether the defendants did not abandon and release the plaintiff from a performance.

REVERSED.

 Wilhelm v. Cedar County.

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78	338

50	254
114	615

50	254
119	539

WILHELM V. CEDAR COUNTY.

1. **Board of Supervisors: COLLECTION OF TAXES.** The board of supervisors may employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty.
2. ———: ———: **RATIFICATION OF CONTRACT.** Ratification of a contract for compensation with such agent, made by the treasurer and county attorney, cannot be inferred from the fact that the treasurer reported it to the board, who acquiesced therein.

Appeal from Cedar District Court.

FRIDAY, DECEMBER 13.

ACTION upon an alleged special contract for services rendered by plaintiff to defendant. In 1869 the board of supervisors of the defendant county passed a resolution which is in these words:

“*Resolved,* That B. Wilhelm, appointed by the board to collect delinquent taxes, be hereby instructed to take counsel of our legal attorney, and proceed in accordance with his directions in all matters in collecting said taxes.”

Afterward the county attorney and county treasurer, with the understanding upon their part, derived in some way in which they cannot now explain, that they were authorized to fix the plaintiff's compensation, agreed to give him the interest on certain delinquent taxes due from persons not known to have any property, and which taxes were collectible only by obtaining the promissory notes of the persons. The plaintiff's compensation was to be paid to him when the notes should be collected. A list of names of tax payers from whom taxes could be collected only in the way above described was given to the plaintiff, and he rendered valuable service to the county in obtaining promissory notes from such tax payers, which notes were afterward paid. The amount which became due the plaintiff under the terms of his employment,

Wilhelm v. Cedar County.

if valid, was three hundred and three dollars and eighty-five cents, for which the court gave the plaintiff judgment. The defendant appeals.

Sylvanus Yates, for appellant.

Piatt & Carr, for appellee.

ADAMS, J.—I. It is insisted by the county that the law makes no provision for the collection of taxes except through the treasurer and his deputy, and that the board of supervisors had no power to employ a special agent or attorney for that purpose. It is made by statute the duty of the treasurer to receive taxes voluntarily paid, and to enforce the payment of all other taxes where it can be done by sale of property. Here we think his duty in this respect ends. Yet it seems that the defendant county found it practicable in some instances to collect taxes from delinquent tax payers from whom forcible collections could not be made. It succeeded in obtaining their promissory notes, which were afterward paid. Now, because the statute does not expressly authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so. They have the power “to represent their respective counties, and to have the care and the management of the property and business of the county in all cases where no other provision is made.” Revision, § 312; Code, § 303. It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question.

II. We think they did appoint him to render the service in question. No other proper construction can be given to the resolution above set out. It is in evidence that there had been at least a previous attempt to appoint him, and if the appoint-

Wilhelm v. Cedar County.

ment was not valid the resolution would make it so as a recognition and ratification.

III. The resolution, however, does not fix the compensation, and that is one of those things which we are inclined to 2. —: —: think the supervisors could not delegate. Whether ^{ratification of} contract. so or not it does not appear that they attempted to delegate it. The provision that the plaintiff should receive counsel and directions from the county attorney has nothing to do with the compensation. The plaintiff relies upon ratification. The treasurer testifies that he reported everything in his monthly reports. Perhaps we should assume that he reported in full the contract with the plaintiff. It is insisted that if he did, and the board acquiesced in it, such acquiescence would be a ratification.

In Dillon on Municipal Corporations, § 385, the author says: "Ratification may be inferred from acquiescence after knowledge of all the material facts." If we should concede that the doctrine enunciated would apply to a case of this kind, it should appear that the board had knowledge of all the material facts. It should not only appear that the treasurer reported the contract in full, but that the board examined the report upon this point. We cannot assume that they did, and there is no evidence respecting it. We think, therefore, the plaintiff has failed to establish a special contract with the board with regard to compensation; but we see no reason why he may not recover what he can show that his services were reasonably worth.

REVERSED.

Crist v. Francis.

CRIST ET AL. V. FRANCIS ET AL.

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1. **Replevin: PLEADING: PRACTICE.** Where, in an action of replevin, the plaintiff dismisses his petition before an answer is filed, the defendant is nevertheless to have a judgment for his interest in the property replevied. But if he files an answer, notwithstanding the dismissal, claiming other and further relief, the plaintiff should be allowed to plead thereto, and introduce evidence upon the issues thus raised. ADAMS, J., *dissenting*.

Appeal from Clay Circuit Court.

FRIDAY, DECEMBER 13.

ACTION in replevin. There was a judgment for defendants. Plaintiffs appeal. The facts of the case fully appear in the opinion.

L. M. Pemberton, for appellants.

E. E. Snow, for appellees.

BECK, J.—I. The petition alleges that plaintiffs are the absolute owners, and entitled to the immediate possession, of certain personal property of the value of two hundred and sixty dollars, which is wrongfully detained by defendants. It is shown that the cause of detention by defendants is based upon a chattel mortgage upon the property, to secure the payment of a note executed by plaintiffs; but it is averred that plaintiffs tendered to defendants the full amount due upon the note, and “the tender has been kept good,” and that demand was made by plaintiffs upon defendants for the property.

Before the term of court plaintiffs filed with the clerk a paper dismissing the action “without prejudice.” At the term the defendants filed a motion asking the court “to reinstate the cause in order that they may have their damages assessed.” This motion was sustained, and thereupon, on

Crist v. Francis.

the same day, defendants filed their separate answers to plaintiffs' petition. The answer of defendant Francis shows that the property was in his hands as sheriff, under proceedings to foreclose the mortgage by sale of the property.

The other defendant, Tucker, in his answer admits the value of the property to be the same as alleged by plaintiffs, but denies every other allegation of the petition. He then avers that the property was taken upon the chattel mortgage given to secure the payment of a promissory note, and the sheriff was about to sell the property as set out in his answer. He also shows the amount due on the note, and alleges that certain costs and attorney's fees are to be added thereto, and for which they demand judgment against plaintiffs and the surety upon their bond. After the filing of the answer, and before the trial, plaintiffs asked permission to file a petition in equity, which shows the borrowing of money from defendants, the execution of the note and chattel mortgage, the proceeding in this case, and alleges that the note is usurious, and no greater sum than twenty dollars is due defendants thereon, which plaintiffs have tendered to defendants. It asks that defendants be enjoined from the further prosecution of the replevin action, and that the note and mortgage may be cancelled. The plaintiffs, upon presenting this petition, asked that a temporary injunction be allowed, and that further proceedings in the replevin suit be stayed. But the court refused to permit the petition to be filed, and would not grant the temporary injunction, "for the reason" (using the language of the abstract) "that this cause was before the court at the time, and the court could not stop to consider the petition." The court proceeded to try the case upon defendants' answers, and the proceedings are set out in the bill of exceptions in the following language:

"The plaintiffs, upon the trial and hearing of said cause, offered to introduce evidence showing that defendants had no interest in the property replevied, and had not sustained any

Crist v. Francis.

damages by reason of said replevin action, which evidence the court refused to hear or permit to be introduced. * * The court refused to permit plaintiffs to file any pleadings, or to introduce any evidence to show defendants' interest in said replevied property, for the reason that plaintiffs, by dismissing their replevin action, were in default, and had no right in court except to cross-examine defendants' witnesses."

During the progress of the trial, and afterward and before judgment, the plaintiffs repeated their offer to file their petition in equity, and asked that it be considered by the court, but were refused.

II. The Circuit Court, we think, did not err in refusing to consider the petition in equity which plaintiffs offered to file. We need give no other reason than this. The relief sought by plaintiffs in the petition ought, as we shall presently see, to have been granted in this proceeding in the action without resort to equity. The plaintiffs, having a remedy at law, were not authorized to institute the proceeding in chancery.

III. The court below, we think, erred in denying plaintiffs' right to file pleadings and introduce evidence to show
1. REPLEVIN: defendants' interest in the property replevied.
pleading:
practice. We think it cannot be doubted that, in the absence of a statute, the defendants would have had no right to recover for their interest in the property, after plaintiffs dismissed their action, by the proceedings which were followed in this case. They would have been required to bring action on the replevin bond, or recover the property by an action for that purpose. The remedy pursued in this case, viz., the determination of the right of the defendants, and its value and the rendition of judgment therefor, exists by virtue of Code, § 3239, which is as follows:

"Section 3239. The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of

Crist v. Francis.

such party, which right shall be absolute as to an adverse party having no right in such property, and shall also award such damages to either party as he may be entitled to for illegal detention of such property."

This provision is authority for a defendant in replevin recovering "the value of his right" in the property by a judgment therefor, to be enforced by execution. We must consider the rights of the parties under this statute. The defendants may recover the value of their interest, and nothing more. This will not be denied when applied to cases wherein there were issues involving the right of defendants. How is it in this case, where plaintiffs, having dismissed their action, are regarded as being in default? See *Wilkins v. Treynor*, 14 Iowa, 391.

We presume that, as the statute authorizes the defendant to recover the value of his right, the plaintiff cannot defeat him of his remedy in the action by dismissing the suit. The statute quoted would thereby be defeated. It provides that the judgment shall determine which party is entitled to the possession, and shall determine the value of his right. To enforce this provision we must hold that the dismissal of the action cannot deprive the defendant of the remedy of judgment for the value of his right in the property. The cause, therefore, should not be finally disposed of upon the dismissal, but should be retained for the purpose of settling defendant's right. This was done in this case. We think the proceeding intended to determine the value of defendant's right—that is, to assess his damage—was correct.

Plaintiffs, having dismissed their action, admit, it may be conceded, defendants' right to recover, and may be regarded as being in default (*Wilkins v. Treynor*, 14 Iowa, 391); but they cannot be regarded in default as to matters not pleaded when they made default. Their default cannot bind them as to matters afterward pleaded by the other party. They could not have admitted such matters.

The answer of defendants sets up their interest in the

Crist v. Francis.

property. That interest had not been before pleaded. Plaintiffs did not admit it as pleaded in the answer. The defendants, upon this answer, claimed relief. Surely the rules of pleading will not bind plaintiffs as admitting the right to the relief claimed in defendants' answer, filed after plaintiffs made default.

The case is not unlike that wherein a cross-petition is filed setting up a counter-claim. The dismissal of the original petition would not be taken as an admission of the counter-claim.

We conclude that plaintiffs ought to have been permitted to plead to defendants' answer and introduce evidence upon the issue thus raised. Our conclusion reaches just results, and prevents the necessity of other actions, either at law or in equity, in order to attain justice. The defendants in this case ought not to recover more than the value of their rights to the property. By determining that right in this case justice is speedily administered, and further legislation avoided—results to be attained if possible.

Wilkins v. Treynor, 14 Iowa, 391, is not in conflict with this decision. In that case the defendants did not answer the petition. Whatever plaintiff admitted by his default were such matters as would have been raised by an issue upon the petition. In this case the court below held that plaintiffs admitted matters put in issue by an answer. The point decided in that case is that defendant therein was not entitled to a trial by jury. In these respects the case is distinguishable from the one before us.

The judgment of the District Court is

REVERSED.

ADAMS, J., *dissenting*.

 Wormer & Sons v. The Waterloo Agricultural Works.

WORMER & SONS v. THE WATERLOO AGRICULTURAL
WORKS ET AL.

1. **Promissory Note: BONA FIDE HOLDER: CORPORATION.** Where a note executed by a corporation was subsequently indorsed by the payee without recourse, the consideration therefor never having been paid, and it then came into the possession of the secretary of the company, who in turn negotiated it for value before maturity, it was *held* that the party taking it from the secretary was entitled to protection as a *bona fide* holder.
2. ——— : **EXTENSION OF TIME.** The granting of an extension of time is a sufficient consideration to uphold a note which has been obtained and negotiated in fraud of the maker.

Appeal from Black Hawk District Court.

FRIDAY, DECEMBER 13.

ACTION to foreclose a mortgage. The plaintiffs claim to be the owners of a certain promissory note executed by the defendant, the Waterloo Agricultural Works, for three thousand dollars, and of a mortgage executed to secure the same upon certain real estate. The plaintiffs received the note as collateral security from one McCall, who was at the time secretary of the defendant company. McCall claimed to be the owner. The company denies that the note was ever rightfully delivered to him, or to any other person. Other facts are stated in the opinion. Judgment for defendants. Plaintiffs appeal.

Boies & Couch, for appellants.

J. L. Husted and *Alford & Elwell*, for appellees.

ADAMS, J.—The note was executed payable to the order of one Edmund Miller. Negotiations had been had with him by the defendant company, for the purpose of obtaining a loan of money from him. The note was one of eight notes drawn for three thousand dollars each. At the time they were executed it was expected

1. **PROMISSORY**
note: bona
fide holder:
corporation.

by the defendant company, for the purpose of obtaining a loan of money from him. The note was one of eight notes drawn for three thousand

dollars each. At the time they were executed it was expected

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Wormer & Sons v. The Waterloo Agricultural Works.

that Miller would take them. The negotiations with Miller, however, failed, and as the notes had been executed payable to his order he indorsed them in these words: "Without recourse to me. Edmund Miller." McCall then agreed with the treasurer of the company to take the note in suit, and he gave therefor his own notes amounting to two thousand dollars, and pledged the note in suit before maturity to the plaintiffs, for an antecedent debt, procuring an extension of time by reason of giving such security.

The question presented is as to whether the plaintiffs acquired a good title to the note. The note is negotiable, and they claim to be *bona fide* holders. In *Central Bank of Brooklyn v. Hammett*, 50 N. Y. 158, the *bona fide* holder of a negotiable note is defined to be "one who has acquired title in good faith, for a valuable consideration, from one capable of transferring it, or from one in the possession of paper with an apparent right to transfer it, and without notice of any defect in his title or right to transfer." The appellants claim, however, that McCall did not acquire a good title, and that the plaintiffs took the note from him with notice. They took the note with notice, of course, of whatever appeared on its face. Now it is said that it appeared on the face of the note that McCall was the secretary of the company. While, then, he held the note, it is said he should have been regarded as holding it as the secretary of the company, as the fact really was. The appellants cite *Clafin et al. v. Farmers' & Citizens' Bank of L. I.*, 25 N. Y. 293. In that case the plaintiff sought to recover upon a check drawn, certified and negotiated by the president of the defendant bank for his own benefit. The plaintiffs claimed to be *bona fide* holders, but the court held otherwise.

The doctrine of that case is, we think, not applicable to the case at bar. The note was made payable to the order of Edmund Miller, and by him indorsed. The presumption arising from the face of the note and indorsement was that the note had been negotiated to Miller, and by him trans-

Wormer & Sons v. The Waterloo Agricultural Works.

ferred. This certainly must be so unless the presumption is rebutted by the character of the indorsement, together with the fact that the note might be regarded as in the hands of the company when in the hands of its secretary. The indorsement was without recourse. While this is consistent with the fact that the negotiation with Miller had simply failed, yet looking at the indorsement alone that would not be the inference. Where the person named as payee in a note fails to take the note, the more proper course, ordinarily, and we think the most usual course, is for the maker to suppress the note, and not take an indorsement of it from the payee. Nor do we think that the appellant's theory is supported to any great extent by the fact that McCall was the secretary of the company. He claimed to hold the note in his own right, and every circumstance known to the plaintiffs was consistent with such claim. We cannot say that there was a lack of prudence upon their part in not questioning the claim. It is certainly common enough for the officers of a corporation to purchase its paper. We are of the opinion, then, that the plaintiffs are *bona fide* holders, and entitled to recover to the extent of the debt for which the note was pledged.

The defendant pleads usury, but we omit to pass upon the question. Most of the essential facts touching the plea of usury are similar to those in the case of Pond against this defendant, decided at this term. There must be usury, we think, if McCall's title to the note were valid. We are inclined to think it was not, and that there is no usury; but McCall is not a party to this action, and we leave the question undetermined.

REVERSED.

OPINION ON REHEARING.

ADAMS, J.—The evidence in this case tends strongly to show that McCall acquired no title to the note. We are inclined to think that such is the fact, and that, in procuring the note from defendants' treasurer and transferring it to the plaintiffs,

Wormer & Sons v. The Waterloo Agricultural Works.

he perpetrated a fraud upon the defendants. In the opinion filed the plaintiffs' rights were made to depend wholly upon the fact that they appeared to have acquired the note before maturity, for a valuable consideration, and without notice. The correctness of the rule of law upon which the decision was based we do not understand to be questioned; but the defendants deny that the plaintiffs acquired the note for a valuable consideration, and deny that they acquired it without notice of the defects of McCall's title. They maintain that the burden of proof is on the plaintiffs to show that they gave value and took the note without notice, and they insist that the plaintiffs have failed to show either fact. As to the burden of proof in such a case the defendants are correct, nor does the opinion hold otherwise. The note in question was taken as collateral to a past-due note made by McCall, and the alleged consideration is the extension of McCall's note. The defendants deny that there was any consideration, upon two grounds: In the first place, they say that the evidence fails to show any agreement for an extension; and, in the second place, they claim that the extension, if given, would not, in law, constitute a consideration.

The fact of the extension was testified to by one of the plaintiffs in these words: "Plaintiffs agreed with McCall to extend the time of the payment of said note. The terms were to extend the payment of the two thousand dollar McCall note until the three thousand dollar note in suit came due. The agreement was verbal, through Howe, and by correspondence between me and McCall." The defendants insist that this is insufficient; that Howe's testimony should have been taken and the correspondence should have been produced. Whether the witness knew what Howe did in such a way that he could properly testify to it may admit of some doubt, but it is not for us to say he did not. As to the correspondence it is sufficient to say that secondary evidence is admissible unless it is objected to. These propositions, indeed, we do not understand to be seriously questioned. But it is insisted

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that the fact that Howe's testimony was not taken and the correspondence not produced, taken in connection with other suspicious circumstances, is sufficient to destroy the witness' credibility. On this point we have to say that we have all read the evidence separately, and have all failed to reach this conclusion.

The same witness states that the note was acquired without notice of defects, and the suspicious circumstances urged as overcoming the evidence, we think, are not sufficient.

That an extension was given, we think, is proven. We come, then, to consider whether it constituted a consideration. We are unable to conclude that it did not.

^{extension of time.} It is quite possible that the plaintiffs lost nothing by the extension. It would be so if McCall were solvent at the expiration of the extension; or if, during the time of extension, nothing could have been collected of him. But the granting of extension was the waiver of the right to enforce immediate payment. That is a sufficient consideration to uphold an ordinary contract, and we think it sufficient to uphold a note where it has been obtained and negotiated in fraud of the maker. It is conceded by defendants that McCall is insolvent. But they insist that the plaintiffs should show something more than the granting of extension; they insist that they should show a positive loss by doing it. But it might not be practicable to show it, even if it were sustained. The chances of collecting something from an insolvent debtor, if vigorously pursued, are better than the chances of showing what could have been collected where he is not pursued.

The defendants say that if the rule in this case is correct corporations are at the mercy of their officers. Corporations, like natural persons, are at the mercy of every one who has the disposition and opportunity to steal their negotiable paper and put it in circulation. But the importance of protecting them is not such as to justify the adoption of a rule which would go far to impair the peculiar value of such paper derived from its negotiability.

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As to whether the plaintiffs should not have inferred from the fact that McCall's name was attached to this note as secretary, that he held it as secretary, or in some way as the property of the company, some of us have entertained great doubt. We have accordingly carefully examined the able argument and the authorities presented in the petition for a rehearing, but we have to say that the conclusion heretofore reached through much hesitation remains unchanged.

The defendants insist that the evidence shows usury. If the defendants made a usurious contract they made it with McCall. But they insist, and in this we think they are correct, that they made no contract with him of any kind.

We think that the petition for a rehearing must be overruled.

FLETCHER V. TERRELL ET AL.

1. **Practice in the Supreme Court: EQUITABLE ISSUES.** Under the Code a case involving equitable issues only, upon the trial of which no motion or order was made for a trial upon written evidence, cannot be determined upon its merits on appeal.
2. ——— : **AMENDMENT.** It is the general rule of practice in the Supreme Court that an amendment to an abstract filed after the case has been submitted will not be considered.

Appeal from Van Buren District Court.

FRIDAY, DECEMBER 13.

THE parties to this action all claim liens upon the Keosauqua North & South Railroad. The said road was originally intended to be of standard gauge. N. C. Terrell & Co., a partnership composed of N. C. Terrell and C. H. Fletcher, contracted with the railroad company to build the road.

Fletcher v. Terrell.

After doing some grading and purchasing some ties, etc., the work was suspended for want of means to prosecute the same. Afterward the contemplated road was changed to a narrow-gauge, and a new contract was made with C. H. Fletcher, under the name of C. H. Fletcher & Co., by which he was to resume the work and complete a certain part of said road. In pursuance of this contract said C. H. Fletcher & Co. purchased of appellants certain locomotives, cars, iron rails, spikes, etc., to be used in completing and operating said railroad. At the time of purchasing said property C. H. Fletcher & Co. executed to appellants certain chattel mortgages thereon to secure part of the purchase money.

The original petition in this case was filed by Fletcher against Terrell to enjoin him from removing certain ties, iron and other material from the line of the road. Terrell filed an answer and cross-bill setting up a mechanic's lien for the amount due Terrell & Co. Other parties also appeared and set up mechanics' liens for work and labor in engineering, and for other labor and material furnished to the contractors for the building of the road. The railroad company being insolvent, and wholly unable to pay any of said claims, the whole contest turned upon the validity of the claims of the respective lien holders and their rights of priority.

The cause was tried by the court. The liens were established and their priority settled. The claims of the parties holding chattel mortgages upon the rolling stock, iron rails, ties, spikes, etc., were found to be inferior to the mechanics' liens. The holders of the chattel mortgages appeal.

Gillmore & Anderson, Joseph G. Anderson and H. Scott Howell, for appellants.

Lee & Beaman, Trimble & Baldwin, D. P. Stubbs, Work & Brown, William Moore and B. Jones, for appellees.

ROTHROCK, CH. J.—The foregoing is a very general state-

Fletcher v. Terrell.

ment of the issues involved in the action. The facts of the case, as presented in the abstract of the pleadings, are exceedingly complicated. There are questions as to the release of liens by certain parties, and as to the admission of evidence to establish liens, and numerous other questions, which, in our opinion, are not necessary to be set out, for the reason that after mature consideration we have arrived at the conclusion that we are not authorized by the record before us to determine this cause upon its merits. The issues tried in the court below were of an equitable character. No motion or order was made for a trial upon written evidence, as provided by section 2742 of the Code. The court made no special findings of fact. Errors are assigned as in appeals in law actions. The abstract does not purport to contain all the evidence.

1. PRACTICE in
the supreme
court : equita-
ble issues.

The real point involved in the appeal, and that which appellants' counsel most ably and elaborately argue, is whether the chattel mortgages upon the rolling stock, iron, rails, etc., are superior to the mechanics' liens. This involves an interesting, and, in this State, a new question; that is, whether the rolling stock of a railroad company and the iron rails in the track are chattel property, so that a chattel mortgage for the purchase money thereof is superior to a mechanic's lien for construction. Upon the first reading of the abstract and arguments of counsel we thought we might determine that question notwithstanding the objection of appellees' counsel that the abstract does not contain all the evidence. But upon further examination we find that the question of the validity of the mortgages was expressly put in issue by an averment of the appellees that a new contract was made by which the lien of the mortgages was superseded or released.

Now what evidence there may have been upon this issue we are unable to determine. The same remark may be made as to the objections to the introduction of evidence. The decree being merely the conclusion of the court as to the

Fletcher v. Terrell.

priority of the liens and the amount thereof, we have no means of determining upon what evidence the decree was found, nor whether the rulings complained of were prejudicial to appellants.

We regret this disposition of the case; but, as appellees insist thereon, no other course seems open to us.

AFFIRMED.

This case was submitted the 5th day of June, 1878. On the 31st day of August, 1878, the appellants served upon the
2. _____: appellees an amendment to their abstract, in
amendment. which they say that the original abstract is an abstract of all the evidence in the case. This amendment has been filed, and we are asked to consider it. Before the amendment was filed the foregoing opinion had been written. In view of the magnitude of the case, and the importance of the questions involved, we have withheld the opinion for the purpose of determining whether we should be justified in departing from our rules and practice so far as to consider the amendment, and we have finally concluded that we should not. We think it is the right of the appellees to have the case determined upon the papers upon which the appellants submitted it. Under some circumstances, doubtless, a submission may be set aside. The case would then be open for such changes in the record as could properly be made; but we cannot consider a case open for changes while it remains submitted. If so, we might be required to write as many opinions as there should be changes made.

The appellants in this case have less reason to complain because the appellees, in their argument filed May 27, 1878, insisted that the abstract was deficient in not purporting to contain all the evidence. After the appellants' attention was called to the defect, and before the case was submitted, they had time to supply the defect. If they had done so the appellees would then have had the right to file such amendment as they might desire, and it would have been their right

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to have the submission postponed for such reasonable time as should be necessary, to the end that when the case should be submitted it might present the questions, and only the questions, which we are called upon to determine.

AFFIRMED.

LORING & CO. V. SMALL ET AL.

DUNBAR V. SMALL ET AL.

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117	333

1. **Mechanic's Lien: BRIDGES: PRACTICE.** The mechanic's lien law is framed with reference only to property which can be sold under execution, and bridges constructed by a county are not, therefore, subject to such a lien. Nor can the court, in an action to enforce a lien upon such property, render a decree for the amount found to be due, without ordering a sale of the property.

Appeal from Plymouth Circuit Court.

FRIDAY, DECEMBER 13.

THE petition and amended petition of the plaintiffs, George E. Loring & Co., in substance allege that about August 8, 1877, they made a parol contract with defendants Isaac Small and Frank C. Tubbs to furnish them bridge lumber for use in the construction of seven bridges, which the defendants Small & Tubbs had contracted to build for Plymouth county, Iowa, at the agreed price of one thousand two hundred and fifty dollars, and which were built in July, August and September, 1877, and duly accepted by the proper officers of said county about the 27th of September, 1877; that plaintiffs, in virtue of their contract with Small & Tubbs, furnished them lumber for said bridges, all of which was used in the construction of said bridges; that on the 29th day of September, 1877, and within thirty days after the last item of lumber was furnished, the plaintiffs filed in the office of the clerk of the District Court of Plymouth county their duly verified account,

Loring & Co. v. Small.

claiming a mechanic's lien on all of said bridges, and against Plymouth county, for the sum of six hundred and sixty-two dollars and seventy-five cents; that on the 29th day of September, 1877, plaintiffs served upon the chairman of the board of supervisors, and the county auditor of Plymouth county, a written notice of their claim and of the filing of their lien, and that they would look to the county for their pay; that the said county, by its officers, well knowing that said contractors, Small & Tubbs, had purchased the lumber for all of said bridges from plaintiffs, and were largely indebted to plaintiffs for said lumber, disregarding the right of plaintiffs to file a claim for a lien against said bridges within thirty days after said materials should be furnished, accepted said bridges on or about September 27, 1877, and on the same day, by its county auditor, issued to said Small & Tubbs the warrants of said county, in the sum of about nine hundred dollars, in full payment of the amount then due for the building of said seven bridges, having at some time prior thereto paid the balance of the contract price to Small & Tubbs in cash; that the plaintiffs presented their claim to the board of supervisors for allowance in October, 1877, and the board refused to allow it; that to secure the faithful performance of the contract the defendant Plymouth county required from the defendants Small & Tubbs the execution of a bond, in the penal sum of twenty-five hundred dollars, conditioned that said parties should build said bridges as contemplated by the contract, and especially that the said bridges should be delivered free from all claims, liens or expenses; that the bond was taken for the express purpose of securing a faithful performance of the contract, and of securing the county against any claims or liens on account of any lumber or materials the contractors might purchase; that said county, through its proper officers, well knowing of said contract and bond, and of plaintiffs' claim for lumber and materials furnished, and that there were claims and liens against said county and said bridges, purposely and fraudulently accepted said bridges and

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paid for the same, without in any manner providing for and retaining sufficient money or warrants from the amount due to Small & Tubbs to pay the claims of plaintiffs, although said county could have done so; that after Small & Tubbs got their warrants they absconded, and failed to pay plaintiffs anything, and that plaintiffs will lose all of their claim unless it can be enforced against the county.

The plaintiffs demand judgment against the defendants Small & Tubbs and Plymouth county for the sum of six hundred and sixty-two dollars and seventy-five cents, and interest, and that their mechanic's lien be established and foreclosed against said bridges and all of the defendants.

The petition of the plaintiff T. E. Dunbar claims one hundred and sixteen dollars and seventy-six cents for hardware furnished the defendants Small & Tubbs for the building of the bridges above mentioned. The petition alleges that the contract therefor was made with Small & Tubbs August 16, 1877; that the goods were furnished between September 4 and 24, 1877; that the statement for a lien was filed October 3, 1877, and on the same day written notice thereof was served on the board of supervisors and the auditor. In all other essential particulars the petition and amended petition of T. E. Dunbar are like the petitions of Loring & Co. The defendant Plymouth county demurred to these petitions. The demurrer was sustained. The plaintiffs excepted, and appeal.

Davis & McKenzie and Struble Bros., for appellants.

C. J. C. Ball, for appellee.

DAY, J.—The mode of enforcing a mechanic's lien is by suit in the District or Circuit Court, and execution for the sale of the property upon which the lien is established. Code, §§ 2140, 2141 and 2142. The Code contains the following provisions: "Section 3048. Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property

1. MECHANIC'S
lien: bridges:
practice.

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which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. * * * 3049. If no property of a municipal corporation, against which execution has issued, can be found, * * * a tax must be levied as early as practicable to pay off the judgment. * * * ”

The opinion of the Supreme Court of Illinois in *Bouton et al. v. Board of Supervisors of McDonough County*, 5 Central Law Journal, 105 (108), is so applicable to every feature of this case that we quote therefrom, and adopt the views therein expressed as our views of this case. In that case it is said: “The further and last ground of claim is that of a mechanic’s lien, in the court-house property, as sub-contractors. By statute an execution cannot issue against the lands or other property of any county of this State. Revised Statutes 1845, p. 133. * * *

The mechanic’s lien law is framed with reference to such property as is subject to be sold under execution. The method which is provided for the enforcement of the lien it gives is by sale upon execution of the property to which the lien attaches for its satisfaction. As to the property which is exempted by law from sale on execution the lien law is incapable of enforcement; and its provisions as respects such are nugatory, and are entirely inapplicable. We hold that the property in question does not come within the purview of the mechanic’s lien law, and that no such lien can attach thereto.” A like decision in reference to such property was made in *Wilson v. Commissioners of Huntington County*, 7 Watts & Serg., 197. In *Board of Education v. Neidenburger*, 78 Ill., 58, such a lien was held not to attach to a school-house. In that case the court say: “The suggestion is made that the court may in such case apply and carry out the provisions of the lien law so far as to pass a decree for the money due, and stop with that, not ordering any sale of the property. But the statute does not contemplate that there shall be any such thing as a personal decree

Clark v. Ralls.

alone. The decree rendered may operate as such, so far as respects any deficiency, after there has been a sale upon execution of the property subject to the lien, and it fails to satisfy the amount found due. The statute, by all its provisions, is only intended to apply and have operation as respects property which may be and is to be sold on execution. We cannot mould the statute to subserve a purpose for which it was never designed." Precisely the same suggestion as was made in the above case is made in the case at bar. The answer to the suggestion above contained is satisfactory and complete. We feel no hesitancy in holding that the property in question in this case cannot be made subject to a mechanic's lien, in view of the statute which exempts it from execution. See, also, *Quinn v. Allen and The Board of School Directors*, 5 Central Law Journal, 271

AFFIRMED.

CLARK V. RALLS ET AL.

1. **Vendor and Vendee: REPRESENTATIONS.** A statement by the vendor, in the sale of a mill and water-power, that "the stream would furnish water to run the mill day and night eight months of the year," was *held* not to constitute a representation entitling the vendee to damages, if the statement proved not to be true.
2. ———: **WARRANTY.** Nor did such a statement constitute a warranty, it being at most but an expression of opinion, upon which the vendee was not authorized to rely.
3. ———: ———. If the vendor had made false and fraudulent statements as to existing facts, as distinguished from opinions, upon which the vendee was justified in relying, he would be entitled to recover for the injury.

Appeal from Marshall Circuit Court.

FRIDAY, DECEMBER 13.

THE plaintiff, and one James W. Clark, in 1872, purchased of the defendants a grist-mill situated upon South Timber

50	275
98	572
50	275
102	317
50	275
107	489
50	275
111	644

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creek, in Marshall county, paying therefore the sum of eleven thousand dollars. He avers that he and James W. were induced to make the purchase by false and fraudulent representations in regard to the character of the stream which furnished the motive power. He avers that the stream is of such a character that the mill is worth much less than it would have been if the stream were of the character which it was represented to be; that he and James W. sustained great damage; that he has since purchased James W.'s interest in the mill, and in whatever claim for damages accrued to them against the defendants. Other facts are stated in the opinion. There was a trial by jury, and verdict and judgment for the plaintiff for three thousand dollars. The defendants appeal.

Henderson & Merriman, for appellants.

Caswell & Meeker, for appellee.

ADAMS, J.—The petition avers that “the defendants stated, not in writing, that the stream was permanent and durable; was not dependent upon surface water and rains for its supply, but was fed by durable springs; that the stream supplied sufficient water and power to run and operate the mill during both the night and day-time for a period of eight months during each and every year.” The plaintiff claims that the statement is both a warranty and representation, and he claims that as a warranty it is broken, and as a representation it is false and fraudulent. The plaintiff and his co-purchaser, James W. Clark, both saw the stream at the time they were negotiating the trade. They saw the amount of water which it contained, and the operation of the mill. Whatever statement, therefore, in regard to the power was made by the defendants, must have been, in effect, either that the water would be sufficient to run the mill eight months a year, or had been sufficient to run it eight months a year up to that time. In the latter sense alone could it be a representation, and constitute a ground of recovery for deceit?

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What, precisely, the statement was is found in the testimony of J. W. Clark. He says that Ralls claimed that it would furnish water to run the mill day and night eight months of the year. The meaning of this, of course, is that he claimed that it would *thereafter* furnish water to run the mill day and night eight months of the year. Besides, he expressly says that he does not think that Ralls said anything about the durability of the stream in former years. If Ralls, when he made a claim as to what the stream would do, had said that the stream had theretofore furnished water to run the mill that much of the year, or, if less, that the dam or mill had been improved, or had stated any other fact as the ground of his claim, there would have been a clear representation, and if the statement proved to be false and fraudulent, and was such that the plaintiff properly relied upon it, then the plaintiff would have been entitled to recover his damages for the deceit; but Ralls' mere claim as to what the stream would do was not a representation. A representation is a statement of an existing fact. *Grove v. Hodges*, 55 Penn. St., 504. But the plaintiff claims that if the statement is not a representation it is a warranty, and that the evidence shows that it has been broken.

The warranty, if it exists, is in parol, and the defendants insist that where real property is sold and conveyed by deed there is a conclusive presumption that no warranty accompanied the sale, unless it is expressed in the deed. A rule similar to this has frequently been held in sales of personal property where there is a bill of sale. *Reed v. Wood*, 9 Vt., 255; *Joliff v. Collins*, 21 Mo., 341; *Lamb v. Crofts*, 12 Met., 353. Whether such rule should prevail in the case of the conveyance of real property by deed we need not determine. The claim made by Ralls as to what the stream would do is not a warranty. It is not more than a statement as to what it would do. It is essentially different from a warranty intended to bind the warrantor and render him liable for damages if at any time thereafter the stream should fail. The

Clark v. Ralls.

purchaser knew well that no human being knew what the stream would do. An estimate, though not an accurate one, could be formed from what it had done; but the country through which it flowed was liable to become more generally cultivated, and that fact alone, to say nothing of the contingency of dry seasons, was liable to diminish it. It would be highly improper to hold that the mere claim or confident prediction as to what the stream would do amounted to a warranty.

Yet this claim appears to have been made largely the basis of the plaintiff's recovery. The plaintiff testified that he relied upon the statement that the stream would run the mill eight months of the year night and day. One Matthews testified as to how much the mill would be worth if the stream would do what it is shown that Ralls claimed that it would. The court instructed the jury that one of the alleged representations, upon which the action was based, was that the stream was sufficient to run the mill eight months of the year night and day. After stating the allegations of the petition, among which was the foregoing, the court said in its fourth instruction:

"These allegations which I have read to you are material in their character, and if you find that they were made by the defendants to the plaintiff or his co-purchaser, preceding the negotiations for the sale, and were believed and relied upon by them, and you further find that these statements were substantially untrue, and were so known to be untrue by the defendants when made, the plaintiff will be entitled to your verdict."

It will be seen from the foregoing that the court regarded the statement or claim as to what the stream would do as a representation, and such that if the jury found that it was false and fraudulent, and relied upon, the plaintiff would be entitled to a verdict. In this view we think the court erred. The appellant, however, while excepting to the fourth instruction, made no assignment of error upon it; but the same

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question was raised, in substance, in instructions asked by the defendants. In their seventh and eighth instructions they asked the court to instruct the jury that the plaintiff cannot recover in this action for breach of warranty of the sufficiency of the water, and that if defendant Ralls pointed out the stream, and only gave his opinion as to the quantity of water the creek would furnish, such opinion does not constitute fraud, and the plaintiff cannot recover. The defendants excepted to the refusal to instruct as asked, and assign the same as error.

The statement or claim as to what the stream would do was, in the nature of the case, but an expression of an opinion, and we think that the jury should have been so told. In this connection we may add that we think that the court erred in the tenth instruction, the giving of which was excepted to and assigned as error. The jury was instructed that if the plaintiff is entitled to recover he will recover the difference between the actual value of the property at the time of the sale, and the value it would have possessed had it been as it was represented to be. Taking the word *represented* in its proper sense the instruction would not be objectionable; but taking it in the sense in which the court used it, as shown by other instructions, as embracing the statement as to what the stream would do, it is objectionable.

The appellee insists, however, that if the court erred in giving or refusing instructions this court cannot properly review the errors for the reason that the assignments of error are not sufficiently specific. The assignments upon the instructions are in these words:

"3. The court erred in refusing to give each of the instructions asked by defendant, and numbered from 1 to 13, inclusive.

"4. The court erred in giving to the jury, upon its own motion, each of the instructions numbered 5, 6, 7, 8, 9, 10 and 11."

These assignments are as specific, we think, as are gener-

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ally made. A separate assignment, it is true, might have been made upon each instruction given, and upon each refused. Such assignment would sometimes be more convenient for discussion and reference, but we can hardly say that it would be more specific.

Where an argument is made, assignments of error not referred to are deemed to be waived. The appellee claims that the assignments of error on the instructions should be deemed to be waived. The instructions are not specifically discussed. The assignments, however, are not waived. They are referred to, and the defendants' theory of the case, as inconsistent with instructions given, and calling for the instructions refused, is elaborately argued.

Many errors are assigned which we do not notice. It is not probable that the questions raised will arise again.

It is proper that we should say that if the defendants made any false and fraudulent statements as to existing facts, as distinguished from opinions, touching the character of the stream, upon which the plaintiff was justified in relying, and did rely, he would be entitled to recover for the injury sustained; and although the defendant Ralls alone may have negotiated the trade and perpetrated the fraud, still, as Willett took the benefit of the trade, including the benefit of the fraud, if any, he would be equally liable.

In treating the mere claim of Ralls as to what the stream would do as a representation instead of an opinion, and in refusing to instruct that it was not a ground of recovery, we think the court erred.

REVERSED.

Peck v. Schick & Co.

PECK v. SCHICK & CO.

50	281
103	200
50	281
117	579

1. **Pleading : AMENDMENT : NEGOTIABLE PAPER.** Where the petition in an action upon an order averred demand and notice, and an amendment filed after argument contained an averment of waiver of demand and notice, it was *held* that the pleadings would sustain a finding of a waiver.
2. **Referee : PRACTICE.** In the absence of the evidence, the finding of a referee upon a question of fact will be presumed to be correct.

Appeal from Wapello Circuit Court.

FRIDAY, DECEMBER 13.

Action upon an order in these words :

“\$1,000.

OTTUMWA, February 1, 1876.

“To Charles F. Blake, Treasurer Ottumwa Water-Power Company :

“Pay to the order of D. B. Sears & Son one thousand dollars, with ten per cent interest, and charge to account.

“W. B. BONNIFIELD, President.

“J. O. BRISCOE, Secretary.”

Upon said order there were the following indorsements in blank : “D. B. Sears & Son.” “J. Schick & Co.”

The plaintiff sold to J. Schick & Co. certain real estate, and took said order from them for part of the purchase money. The action was brought against all the parties to the instrument, but J. Schick & Co. alone defended.

It appears from the abstract of appellant, and the additional abstract filed by appellee, that the plaintiff filed in succession four amendments to his petition. The cause was tried before a referee. The third amendment was filed during the argument of the cause before the referee, and the fourth was filed after the close of the argument. The defendants answered the petition as first amended, and each amendment thereafter made. The record of the pleadings as presented in the

two abstracts is necessarily very much confused. We will endeavor to state the substance only.

1. It is averred in the original petition that the order was transferred by J. Schick & Co. to plaintiff in February, 1876, and that plaintiff, in company with Charles Schick, one of the defendants, at once presented the same to Blake, treasurer, for payment, and the parties were informed by said treasurer that there was no money in his hands for payment, and that notice of non-payment was given to defendants.

2. The first amendment to the petition sets out that plaintiff repeatedly demanded payment of the water-power company, which was refused, and that he had frequent conversations with said Charles Schick and with the other defendants, and told him and them that the water-power company refused payment, alleging that the company had no money with which to pay; that after the defendants were informed that the order was not paid they repeatedly agreed to pay it. This amendment sets out times and places when and where, on two occasions, the defendants promised to pay said order.

3. The third amendment avers that defendants indorsed the order to plaintiff as part of the consideration for certain real estate sold by plaintiff to defendants, and that it was frequently talked of by plaintiff and defendant that there was no money in the treasury of the water-power company to pay the order.

The defendants answered the original and amended petitions by admitting that the water-power company executed the order, and that D. B. Sears & Son and the defendants indorsed the same, and that defendants indorsed it to plaintiff as part of the consideration for certain real estate. They denied that plaintiff presented said order to the water-power company for payment, or demanded payment in presence of the defendant Charles Schick, or in presence of any of the defendants, and denied that said treasurer informed Charles Schick, or any of the defendants, in presence of the plaintiff, that there was no money in his hands with which to pay the same.

Peck v. Schick & Co.

They also denied generally each and every other allegation in the petition and amendments thereto.

4. The next amendment to the petition was filed during the argument of the cause before the referee, and averred that "the defendants, with a full knowledge of all the matters relating to a demand of payment and notice of non-payment, and after being fully acquainted with the premises, agreed that they would pay said note or bill, and unequivocally acknowledged their liability as indorsers, and waived all laches of plaintiff, if plaintiff had been guilty of any laches." To this amendment the defendant answered, denying the demand and notice alleged, and denying that defendants "were acquainted with the premises; denying that they agreed to pay the note or bill, or acknowledged their liability as indorsers, and denying that they waived laches of plaintiff."

5. The last amendment made to the petition avers that said order is not a negotiable instrument, and is not subject to demand and notice in order to bind indorsers, as in the case of negotiable instruments. It is also again averred that the defendants knew the water power-company had no funds with which to pay said order, and knew that it would not be paid, and had no right to notice of presentment and non-payment. "Also, said defendants, indorsers on said note, waived the want of due notice, and, with full knowledge of all that had been done in the premises, promised subsequently to pay and take up said check sued on."

To this amendment the defendants answered, denying each and every allegation therein. This answer also contained these words: "For further answer said defendants say plaintiff should not claim that they ever made a waiver of demand and notice, because he alleges that there was due demand made on the maker, and due notice of non-payment given."

The referee reported in substance that the plaintiff demanded payment of the order of the treasurer of the water-power company, and that payment was refused, but that

 Peck v. Schick & Co.

plaintiff did not give notice to defendant of the non-payment within the proper time.

The seventh paragraph of the findings of the referee is as follows:

"7. I find that said J. Schick & Co. expressly waived notice of non-payment of said order about the last of September or forepart of October, 1876, with a full knowledge that no such notice of non-payment had been given, and did then unconditionally agree with plaintiff, J. M. Peck, to pay the full amount of said order, with a full knowledge that no such notice of non-payment had been given them. I also find that plaintiff is entitled to a vendor's lien on the land purchased, for the amount due, commencing at date of purchase."

Upon this finding the referee recommended a judgment for the plaintiff. The defendants filed exceptions to the report of the referee, which were overruled, and a judgment was entered accordingly. Defendants appeal.

Chambers & McElroy, for appellants.

W. W. Corey, for appellee.

ROTHROCK, CH. J.—I. We have been somewhat particular in stating the substance of all the pleadings because it is strenuously argued by counsel for appellants that under the pleadings the referee was not warranted in finding that the defendants, with a full knowledge of the want of notice of non-payment, expressly waived the same, and unconditionally promised to pay the full amount of the order. It is urged that the plaintiff, by his petition and all the amendments thereto, pleaded that he made demand and gave notice of non-payment, and, therefore, cannot recover upon a waiver and promise to pay by defendants.

1. PLEADING:
amendment:
negotiable
paper.

It is true that a party can only recover upon the cause of action set forth in his petition, and he cannot under our sys-

Peck v. Schick & Co.

tem of pleading, in an action against the indorser of a note, aver demand and notice, and then recover thereunder upon proof of facts amounting to a waiver of them. *Lumbert & Co. v. Palmer*, 29 Iowa, 104, and authorities there cited. But, while it is true our practice requires that the petition must contain a statement of the facts constituting the cause of action, yet it is not required that such statement should be certain to a certain intent in every particular. In the last amendment to the petition in this case it is distinctly averred that the defendants waived the want of due notice, and this is pleading, inferentially at least, that no notice was given. To this there is a general denial, and, as showing that the defendants knew that plaintiff, by his amendment, relied upon the waiver of notice, and were, therefore, advised of what was claimed, the answer sets up that plaintiff should not claim a waiver of demand and notice, because he alleges that there was demand and notice.

It seems that the plaintiff relied upon both grounds, and this he might have done in the first instance by stating his cause of action in separate counts. *Pearson v. The Milwaukee & St. Paul R. Co.*, 45 Iowa, 497. He pleaded it by amendment, presumably, to make the pleadings conform to the proof, as provided in section 2689 of the Code.

We think the pleading as to the waiver of notice and promise to pay, with a full knowledge of the facts, was sufficient, especially after verdict. If too general and indefinite in its statements of facts it should have been assailed by a motion for a more specific statement.

II. It is further urged that the finding of the referee that defendants waived notice of non-payment and promised to pay the order is not justified by the facts found
2. REFEREE: practice. by the referee. The record does not contain the evidence. The referee filed a supplemental report setting forth that an agreement was made between the parties at a certain time and place that defendants would pay the order, and that he found from the testimony that both parties

Bloom v. Wolfe.

"understood, at the time the agreement to take up the order was made, that there had been no notice of non-payment given in time, unless the notice at the time the order was received was notice." It will be seen from this extract from the report that the referee did not undertake to report the evidence. In the absence of the evidence we must accept the report as correct as to the facts found.

III. The appellee claims that the order in question is not a negotiable instrument, and that the defendants would be liable without demand and notice. The instrument is in form negotiable. Whether the water-power company was such corporation as was authorized to draw negotiable paper we are not called upon to determine, because the record does not disclose for what purpose the corporation was organized.

It seems to have been assumed by the referee that the instrument was negotiable, and the cause was tried by the parties upon that theory, and there we will let it rest.

AFFIRMED.

BLOOM v. WOLFE.

1. **Conveyance: WARRANTY: TRUSTEE.** If a trustee bind himself by a personal contract, though he describe himself as trustee, he is liable upon his covenant, as he would be in case the property were held and conveyed in his own right.
2. ———: ———: **CONSIDERATION.** In an action upon a covenant of warranty the covenantor is liable for the real consideration paid by the covenantee, without regard to the parties receiving it, or the manner of its appropriation.

Appeal from Clinton Circuit Court.

FRIDAY, DECEMBER 13.

ACTION at law to recover upon the covenants of warranty in a deed executed by defendant's intestate, conveying certain land to plaintiff. The petition shows that the title failed

Bloom v. Wolfe.

and that plaintiff was evicted from the land. The plaintiff filed a motion to strike from the files the answer of defendant, which was sustained. Defendant standing upon his answer, a judgment was rendered against him, from which he appeals.

Merrell & Howat, for appellant.

A. R. Cotton, for appellee.

BECK, J.—I. The answer of defendant, which, it is claimed, sets up an equitable defense, shows the following facts: The land described in the deed upon which this suit was brought was conveyed to defendant's intestate, Ames, by one Flinn, by deed, containing the usual covenants of warranty, as security for three hundred and ninety-one dollars, borrowed money. Ames agreed to convey the property as required by Flinn, whenever the debt was paid or secured in some other manner. Flinn became indebted to plaintiff, and to satisfy this claim it was agreed between these two parties that plaintiff should pay or secure the claim of Ames, discharge his own claim, and pay to Flinn the difference between the sum of these debts and seven hundred and twenty dollars, the agreed purchase price of the land. Flinn at this time was insolvent, and plaintiff knew of the arrangement between Flinn and Ames under which the latter held the title of the land. Ames was no party to the arrangement between plaintiff and Flinn, and upon request of Flinn conveyed the premises to plaintiff. Thereupon plaintiff assumed the debt of Flinn to Ames, and secured it by a mortgage upon the land. Plaintiff discharged his claim against Flinn and paid him the balance of the purchase money. It is averred that the only consideration received by Ames was the note of plaintiff, which defendant offers to surrender, and cancel the mortgage securing it. It is alleged that Ames had no knowledge of the consideration passing between plaintiff and Flinn, and that plaintiff had notice of the relations existing between Flinn and Ames. The failure of the title and eviction of plaintiff are not denied.

 Bloom v. Wolfe.

No question is raised as to the form of the attack upon the answer by a motion to strike. We are required to determine whether the answer presents a sufficient defense to this action.

II. The case involves certain familiar elementary principles, the application of which will determine the rights of the parties. We will proceed briefly to state them.

Ames, according to the statements of the answer, held the land as a trustee. In discharge of the trust he executed the deed to plaintiff upon the covenant of which this action is brought.

III. A trustee, in conveying land which is the subject of the trust, cannot be required to enter into any covenant other than that he has done no act to incumber the premises. But if he bind himself by a personal covenant, though he describe himself as trustee, he is liable upon his covenant, as he would be in case the property were held and conveyed in his own right. *Foster et al. v. Young*, 35 Iowa, 27; *Duvall v. Craig*, 2 Wheat., 45; *Sumner v. Williams*, 8 Mass., 162; Hill on Trustees (3d Am. Ed.), p. 413 (marg. p. 281). These rules are based upon sound reason, and are in harmony with the principles of the law which sustain contracts when based upon sufficient consideration, and will not permit a party to deny the covenants embodied in his deed. We conclude that defendant is liable upon the covenants of warranty to the same extent as though they had been executed by the decedent in conveying his own property.

IV. Defendant insists that, as the decedent received but a part of the consideration for the land, he is liable for no greater account. The real consideration paid
 2. —: —: consideration: may be shown, even in contradiction to the deed, in actions of this kind. But it cannot be shown that the consideration was not wholly or in part received by the covenantor or for his use. Did such a rule prevail it would defeat the other rule we have just stated. Trustees often, if not

1. CONVEY-
 ANCE: WAR-
 ranty: trus-
 tee.

Eggers v. Redwood.

usually, receive no part of the consideration of deeds made by themselves. There can be no such conflict in the law. In actions of this kind the covenantor is liable for the real consideration paid by the covenantee, without regard to the parties receiving it, or the manner of its appropriation.

Byrnes v. Rich, 5 Gray, 518, is cited by defendant's counsel. It fails to support their views, as the covenantor was not a trustee. He sold land to one party, and made a deed under direction of the purchaser to another. The purchaser had, before the execution of the deed, contracted with the grantee therein to have the land conveyed to him in satisfaction of the debt due him from the grantee. The court held that neither the consideration named in the deed, nor the amount paid by the purchaser, was the actual consideration; and that, as the actual consideration could not be discovered, the value of the land was the measure of the damages. The case has no bearing upon the question presented by the record before us.

In our opinion the answer presented no defense to the action. The judgment of the Circuit Court is, therefore,

AFFIRMED.

EGGERS ET AL. V. REDWOOD ET AL.

1. **Judicial Sale; SEPARATE LOTS.** Where an officer's return of an execution sale of different lots recites that they were sold for a certain sum, but does not state whether separately or together, the presumption is that the officer did his duty and sold them separately.

Appeal from Jackson District Court.

FRIDAY, DECEMBER 13.

ACTION in equity to set aside a sale on execution of the homestead of plaintiffs. The petition states that the plaintiffs, being the owners of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 9, and the E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of the same section,

 Eggers v. Redwood.

executed a mortgage thereon, which was foreclosed, and said premises ordered to be sold on special execution; and the same was sold thereon in a lump, instead of the ten-acre tract being sold first and separately, and the forty-acre tract or homestead sold separately, to supply the deficiency, if any there was; that the said N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ "is the homestead of the plaintiffs, and occupied by them as such; that the fact that it was so occupied by the plaintiffs as a homestead was known to the defendants, and the sheriff who made the sale of said premises; that plaintiffs were not present at said sale, neither did they consent to or authorize the selling of said premises in a lump, and the said Henry Eggers says he never had any notice served on him of the said sale of said premises, said notice being served on one Mari Eggers only."

The relief asked is "that the sale be set aside and a re-sale ordered, and that defendants be taxed with the costs of said illegal sale." There was a demurrer to the petition, on the ground that it did not state facts sufficient to entitle the plaintiffs to the relief asked. The demurrer was sustained, and plaintiffs appeal.

F. M. Fort, for appellants.

Levi Keck, for appellees.

SEEVERS, J.—The sole and only ground relied on to set aside the sale is that the premises were sold together, instead of separately, and the homestead sold only to supply the deficiency, if any, after exhausting the other property. No prejudice in any other respect is averred; nor is it averred or claimed that the sheriff did not first offer, and separately, the ten-acre tract for sale. The presumption is that the officer did his duty in this respect, in the absence of any showing to the contrary. This was held in *Love v. Cherry*, 24 Iowa, 204, and it is there said in substance that, when an officer's return of an execution sale of two lots states

1. JUDICIAL
sale : sepa-
rate lots.

Stricker v. Holtz.

that they were sold for a certain sum, but does not state whether separately or together, the presumption is that the officer did his duty and sold them separately. That one of the tracts was the homestead could make no difference in this respect. The presumption that the officer did his duty should prevail in such case as well as in any other, and it was substantially so held in *Burmeister v. Dewey*, 27 Iowa, 468.

Certainly, if the sheriff first offered the ten-acre tract and there were no bidders, it was his duty to offer and sell the whole, including the homestead, together. Otherwise the plaintiffs could enjoy and get the use of premises which they had expressly pledged to pay the debt, without ever paying the same, unless the plaintiff in execution chose to purchase the property other than the homestead. This is not the meaning and intent of the statute.

AFFIRMED.

STRICKER V. HOLTZ.

1. **Appeal: DISMISSAL.** Where a cause is dismissed because of the non-appearance of the plaintiff, and judgment is rendered against him for costs, an appeal will not lie from such judgment.

Appeal from Kossuth Circuit Court.

FRIDAY, DECEMBER 13.

ACTION upon a promissory note brought before a justice of the peace. On the return day the defendant, at the hour set for trial, appeared, but the plaintiff did not. Thereupon the justice dismissed the action, and made an entry in the following words:

"The plaintiff did not appear, nor any one for him. The defendant appeared in person. I waited one hour, but the plaintiff not appearing I dismissed the action for want of

50	291
83	740

50	291
112	512

Stricker v. Holtz.

appearance of the plaintiff, and taxed the costs against the plaintiff; and judgment is hereby rendered against the plaintiff for costs, taxed at twenty-six dollars and seventy-five cents."

The plaintiff appealed to the Circuit Court, and in the Circuit Court the defendant filed a motion to dismiss, in these words:

"The defendant moves to dismiss this cause for the following reasons:

"1. There was no judgment from which an appeal will lie.

"2. There was no question either of law or fact presented to the court below for decision.

"3. The cause was dismissed in the court below for want of appearance of plaintiff, and the record shows that the plaintiff made no effort in that court to have the cause reopened or to excuse his default.

"4. The judgment for costs was given by reason of the non-appearance of the plaintiff to prosecute, and the record shows that the plaintiff made no effort in the court below to have the judgment set aside, to have the costs retaxed, or to excuse his default.

"5. Plaintiff has not exhausted his remedy in the court below, nor has he given the court below an opportunity to pass upon the matters of his appeal.

"6. If the plaintiff had put himself in position to demand relief from this court his remedy would be by writ of error and not by appeal."

On the same day the plaintiff filed his affidavit to the effect that the note sued on was filed with the justice at the time of the commencement of the action, and was on file on the day set for trial. The court sustained the motion to dismiss, to which the plaintiff excepted, and he now appeals.

Geo. E. Clarke, for appellant.

A. L. Hudson, for appellee.

Simpson Centenary College v. Bryan.

ADAMS, J.—If the decision does not affect the plaintiff's right to recover in another action it is not final, and the error of the justice is reviewable upon writ of error and not upon appeal. *Belding v. Torrence*, 39 Iowa, 516. In that case there was a dismissal for want of jurisdiction, but the same principle is involved as in the case at bar. The appellant insists that there was at least a final judgment for costs. But costs are a mere incident to the decision. The judgment, the finality of which gives a right of appeal, must be a determination of some question affecting the merits of the controversy, or some portion of it. In *Griffin v. Moss*, 3 Iowa, 262, it was held that an appeal would lie from an order of a justice dismissing an action, but in that case judgment was rendered against the plaintiff for fifty dollars and fifty-five cents *damages*, as well as costs.

In dismissing the plaintiff's appeal in the case at bar we think the Circuit Court did not err.

AFFIRMED.

SIMPSON CENTENARY COLLEGE V. BRYAN.

I. PER BECK, J., ROTHBOCK, CH. J., CONCURRING.

1. **Pleading: DEMURRER: MORE SPECIFIC STATEMENT.** Where, in an action on a promissory note, the defendant pleads want of consideration, without stating the facts upon which the defense is based, the answer is assailable, not by demurrer, but by motion for more specific statement.
2. **Promissory Note: CONSIDERATION: ORAL AGREEMENT.** A contemporaneous oral agreement may be the consideration for a promissory note, and a failure to perform the agreement will constitute a failure of the consideration of the note.
3. **Corporation: POWERS.** Where the articles of a corporation do not clothe it with power to raise and control funds for a specified purpose, it has no authority to take a note executed to promote such a purpose, and the collection of such a note cannot be enforced by the corporation.

50	293
79	198
50	293
118	80
50	293
129	367

Simpson Centenary College v. Bryan.

II. PER ADAMS, J., SEEVERS AND DAY, JJ., CONCURRING.

Promissory Note: CONSIDERATION. A note executed to an educational institution as a gift, upon the strength of which it has assumed responsibilities and incurred liabilities, is not without consideration.

—: —. An agreement, made at the time of the execution of the note, that the fund in favor of which it was executed should not be diminished, cannot be regarded as constituting the consideration for the note.

Incorporation: POWERS. The fact that plaintiff's articles of incorporation did not authorize it to raise an endowment fund, should not be regarded as a prohibition upon the raising of such a fund.

Appeal from Warren Circuit Court.

FRIDAY, DECEMBER 13.

THIS is an action on a promissory note executed by defendant, as follows:

"ENDOWMENT NOTE.

"SIMPSON CENTENARY COLLEGE,
500. INDIANOLA, IOWA, January 1, 1869.

"Five years after date I promise to pay to Simpson Centenary College five hundred dollars, for value received, with eight per cent interest, payable at the office of the treasurer of said college on the 1st day of January and July of each year."

The petition alleges that the note was given by the defendant to the plaintiff for the support of its endowment fund, and that plaintiff, relying upon the payment of said note, principal and interest, has assumed responsibilities and incurred liabilities, and the same have been incurred and assumed in consequence of the giving of said note.

The answer denies that the defendant is indebted to the plaintiff on the cause of action set out in the plaintiff's petition. For further answer the defendant says:

"1. That it is true, as stated in the petition, that he executed the note set out therein, but that plaintiff ought not to

Simpson Centenary College v. Bryan.

recover against him thereon because the same is without consideration; that said note was executed as the evidence of a promise made by the defendant to the plaintiff that he would make it a gift of five hundred dollars in five years thereafter, and for no other purpose whatever; and that the defendant never received any consideration for said promise and note, either directly or indirectly, and that the same are entirely without consideration and void.

"2. That on or about the 1st day of January, 1869, the defendant promised that in five years thereafter he would make a gift to the plaintiff of five hundred dollars, and as evidence of such a promise, and for no other purpose, he executed the note sued on; that when said promise was made, and said note executed, the plaintiff had erected a college building, and was maintaining a college therein, in Indianola, Iowa, for the purpose of teaching the ordinary academic studies usually taught in such institutions; that said promise was made by defendant and accepted by the plaintiff on terms and conditions that said gift, when made, should go into and constitute a permanent fund for the endowment of said college as then constituted and organized, and for no other purpose, and that the same, together with all similar donations theretofore made or thereafter to be obtained, should never be expended, nor the aggregate sum thereof lessened; that said promise was made and said note executed with the understanding by the plaintiff and defendant, and on the condition, that said gift promised by defendant, and all funds and donations then held by the plaintiff, or thereafter to be acquired by it for the purposes aforesaid, should be used exclusively in the manner and for the purposes aforesaid; that when defendant promised said gift the plaintiff had a large amount of similar promises and funds, and thereafter acquired large amounts, and in direct violation of said understanding, conditions and purposes the plaintiff, since the execution of said note, has expended large amounts of said permanent endowment fund for unlawful purposes, and has greatly reduced the

Simpson Centenary College v. Bryan.

aggregate sum thereof, and has established and is now maintaining in Des Moines, Iowa, a law department of its said college; that in establishing and maintaining said law department the plaintiff has wrongfully expended large sums of money, given to it as aforesaid and for the purposes aforesaid, and has contracted debts and incurred liabilities to be paid out of said funds contrary to the understanding, conditions and purposes aforesaid, upon which said defendant made said promise; that by reason of the premises aforesaid the defendant is released from his said promise, and the same and the said note are void and without consideration; denies each and every other allegation in said petition."

Afterward the defendant filed an amendment to his answer, reaffirming the first division thereof, and in addition thereto alleges "that the plaintiff's articles of incorporation do not authorize it to raise or in any manner control or manage a fund such as said note was given to raise."

The defendant reaffirmed all of the second division of his answer, and, in addition thereto, says "that the plaintiff, by its articles of incorporation, is not authorized to raise, manage or control such fund, and the plaintiff cannot be compelled to take charge of or manage said fund."

The plaintiff demurred to the first and second counts of this answer, and the amendments thereto. The demurrer was sustained. The defendant failed to plead over, and elected to stand on his answer, and the court rendered judgment for the plaintiff in the sum of seven hundred and sixty-five dollars and nineteen cents. The defendant appeals.

Bryan & Seevers, for appellant.

Henderson & Berry, for appellee.

BECK, J.—I. An opinion was heretofore filed in this case affirming the judgment of the Circuit Court. Thereupon defendant filed a petition for rehearing, which was allowed, and the cause was again argued and submitted to the court.

Simpson Centenary College v. Bryan.

Upon a careful reconsideration of the whole case we are satisfied that the conclusions announced in our former opinion are incorrect, and that the judgment of the Circuit Court ought to be reversed. We have no apologies to make for changing our conclusion, as we hold ourselves always ready to do so upon a rehearing whenever we discover that we were in error, and are happy to be able to avert any wrong that would have resulted from our failure to correctly apply the law.

II. The petition alleges that plaintiff assumed responsibilities and incurred liabilities in consequence of the execution of the note in suit. The consideration of the instrument is thus shown by the petition. It has been held that a contract of this kind may be supported upon such consideration. An authority cited and relied upon by defendant is to this effect. The answer in the first count alleges that the note in suit was given without consideration, but does not set up the fact upon which the allegation is based. The want of consideration is a proper defense, and, when properly made, puts in issue the consideration alleged expressly or impliedly in the petition. This defense is set up in the second count of the answer. If it is not sufficiently set up, and the facts upon which the defense is based should have been pleaded, the count of the answer should have been assailed by motion under Code, § 2720, and a more specific statement of the defense should have been required.

III. The second count of the answer sets up that the note in suit was executed by defendant and accepted by plaintiff upon the agreement of plaintiff to perform certain conditions expressed in the answer constituting the consideration of the note, which has been violated and disregarded by plaintiff. This surely is a good defense. The note cannot be enforced if the agreement of the plaintiff upon which its consideration is based has been violated by the payee. If the defendant's note was given as a part of a

1. PLEADING
demurrer:
more specific
statement.

2. PROMISSORY
note: consider-
ation: oral
agreement.

particular fund, the amount of which plaintiff agreed with defendant should never be diminished, and it was to be used for specified objects, and this agreement was the consideration for the note, it cannot be doubted that an appropriation of such fund to other objects, and its use so as to diminish its amount, would constitute a defense to the enforcement of the note. If the defense was insufficiently stated, the defect should have been pointed out by motion for a more specific statement.

As this is a point of contest it may be admissible to attempt to make plainer that which is so very clear. The consideration for the note is found in an agreement of plaintiff to perform certain acts; to preserve undiminished and apply to its proper purpose the endowment fund. The failure to perform this agreement constitutes a failure of the consideration of the note. This consideration may be shown by parol testimony without violation of the rule which declares that evidence of that character is inadmissible to change or vary a written instrument. The consideration of a written contract may be shown by parol. If that consideration is found in an unwritten agreement it may be proved by oral testimony. It is the case of two contracts—one written, the other parol. The last, being the consideration of the first, may be shown upon an issue involving such consideration.

Atherton v. Dearmond, 33 Iowa, 353, is not in conflict with the foregoing views. In that case evidence of an oral contemporaneous agreement, varying the amount recoverable and making it contingent, was held inadmissible in an action upon a note. In that case we used this language: "But in the case before us the contemporaneous contract set out in the answer reaches further than to create or specify a consideration upon which the note is based. It directly alters the terms of the contract embodied in the note, and annuls in part its obligations. In the note the defendants are bound to pay a sum of money without conditions. By the parol

Simpson Centenary College v. Bryan.

contract they are bound to pay that sum only upon the happening of a certain contingent event, and the note, by the terms of this contract, is declared to be defeated in part, in case that event does not happen. It is very plain that the two contracts are in conflict and inconsistent; that the parol agreement varies and contradicts the note."

In the case before us the contemporaneous contract, namely, the agreement for the preservation and proper use of the endowment fund, pertains to the consideration of the note in suit, and reaches no further. The evidence establishing it does not render the note uncertain or contingent as to the amount thereof. The distinctions between this case and the one just cited are obvious.

IV. The amendments to the first and second counts presented a good defense to the action. If the articles of incorporation of plaintiff do not clothe it with the power
 3. CORPORA-
 TION: powers. to raise and control funds, by taking notes of the character of the one in suit, it surely had no authority to accept the instrument and cannot enforce it. This defense does not call in question the existence of the corporation, or set up its want of legal organization, which could not be done under Code, § 1089, but denies its power to do acts upon which its right to bring the suit is based, namely, to accept and enforce the note executed by defendant.

Other questions discussed in the case need not be considered, as, for the error in sustaining plaintiff's demurrer, the judgment of the Circuit Court must be

REVERSED.

The Chief Justice unites with me in the views of the case presented in the foregoing discussion. The other justices concur in the separate opinion of Mr. Justice ADAMS, which reaches the conclusion that the case must be reversed upon only one of the several grounds relied upon in the foregoing opinion.

ADAMS, J.—I think this case should be reversed, but I do

not concur in the grounds of reversal as set out in the opinion of Mr. Justice BECK.

As to the first division of the answer I think that the demurrer was properly sustained. The division merely shows that
4. PROMISSORY note: consideration. the note was executed to the plaintiff college as a gift. This the petition itself shows. But the note is not necessarily without consideration because it was executed as a gift. It is not without consideration if the plaintiff has assumed responsibilities upon the strength of it, and the petition shows that it has. To such a petition the averment that the note was executed as a gift constitutes, I think, no defense.

The second division of the answer contains a denial—a point that was overlooked when the case was first before us. A denial is made of every allegation not admitted, and what is admitted is not enough to justify the rendition of a judgment in favor of plaintiff. The execution of the note is admitted, but that fact alone is insufficient because the note is shown to have been executed as a gift. It is admitted, also, that responsibilities have been assumed, but only such as were to be met by the principal of the fund for which the note was given, contrary to the alleged agreement. I do not think it would be proper to allow the assumption of such responsibilities to be shown as a consideration of the note. All else is denied.

The answer, by reason of this denial, showed a defense, and I concur in the opinion of Mr. Justice BECK that the case must be reversed; but I differ in this, that I do not think that any defense is shown by the affirmative allegations. In this respect I think the opinion originally filed was correct. It is proper that I should say, also, that that is all that was decided. That is all that was argued. The fact that there was a denial in the answer was not called to our attention until it was done in the petition for a rehearing, and, even now, the stress of the petition is laid upon the affirmative allegations.

As I differ in opinion as to the sufficiency of the affirmative

Simpson Centenary College v. Bryan.

allegations, I will point out in a few words my reasons. These
 5. —: ——. allegations are, in substance, that the note was
 executed with the understanding that the principal of the so-called endowment fund, of which the note was to constitute a part, should not be diminished.

It is averred that it has been diminished contrary to the understanding, and that the defendant is thereby released. It is also averred that for this reason the note is without consideration. Mr. Justice BECK (with whom the Chief Justice concurs) holds that if there was an understanding that the principal of the endowment fund should not be diminished, and it has been diminished, the note is without consideration. In my opinion the keeping of the principal of the endowment fund undiminished cannot be regarded as the consideration of the note. If the principal of the endowment fund was to be kept undiminished, it was to be kept so forever. That is the fair construction of the defendant's averment. Now if that is the consideration there would be no time when it would exist.

Again, a note cannot have a consideration and be without a consideration at the same time; but if the plaintiff has incurred legitimate obligations on the strength of the note it certainly has a consideration. Such fact would not be negatived nor in any way affected by suffering the principal of the endowment fund to become diminished. This understanding, if any such existed, as to the conservation of the principal of the endowment fund, was held in the original opinion to be, at most, an attempt to attach a condition to the note. My view remains unchanged.

It is averred in an amendment to the defendant's answer that "the plaintiff, by its articles of incorporation, is not
 6. CORPORATIONS: POWERS. authorized to raise, manage or control such fund, and the plaintiff cannot be compelled to take charge of or manage said fund." It is not averred that the articles of incorporation prohibit the plaintiff from receiving an endowment. If they do, the college should be changed into

 Slemmer v. Crampton.

a lunatic asylum for its founders. The most that can be inferred from the defendant's averment is that the articles of incorporation do not expressly authorize the plaintiff to receive an endowment by endowment notes or otherwise; but every incorporation has, by implication, power to do everything that is reasonably necessary or convenient to accomplish the object for which it was instituted. That an endowment is convenient for a college, not to say necessary, will be denied by no one. We must say, then, as a matter of law, that in the absence of an express provision in the articles of incorporation, prohibiting the plaintiff from receiving an endowment, it may receive one. As the want of power must rest upon an express prohibition, the defendant, in setting up a want of power, should have averred the prohibition.

Mr. Justice SEEVERS and Mr. Justice DAY concur in this opinion.

REVERSED.

 SLEMMER V. CRAMPTON ET AL.

1. **Will: DEVISE OF LIFE ESTATE.** A will devising the use and enjoyment of certain real estate to A. "to be enjoyed by her during her natural life only," and after her death to her heirs, "free and clear of all liens and incumbrances thereon," was *held* to give her only a life estate, the intent of the testator being to create a new stock of descent at her death.

Appeal from Bremer District Court.

FRIDAY, DECEMBER 13.

ACTION to foreclose a mortgage. The answer admits the allegations of the petition, but it is stated therein that Maria A. Crampton, whose name before her marriage was Maria A. Avery, and by whom the mortgage was executed, only had a life estate in the mortgaged premises, and the court was

50	308
85	317
50	308
96	54
50	302
104	650
50	302
e127	50
j127	54

Slemmer v. Crampton.

asked to provide in the decree that such life estate only should be sold. Such a decree was entered and the plaintiff appeals.

D. T. Gibson, for appellant.

No appearance for appellees.

SEEVERS, J.—Whatever title Maria A. Avery had was derived through the will of George W. Avery, her father. It provides: "I give and bequeath unto my beloved daughter, Maria A. Avery, to be used, occupied, and enjoyed by her after she becomes of the age of legal majority, during her natural life only, the following lands: * * * * * and it is my further will that after the death of my daughter Maria said lands and lot shall go to the heirs of her body fee (free) and clear of all liens and incumbrances thereon."

1. WILL: devise of life estate. It is insisted the said Maria under the will took a fee simple estate under the rule in *Shelley's Case*. Such rule has been defined as follows: "That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or entail, the *heirs* are words of limitation and not words of purchase." 4 Kent, 215. The same author says: "There is more latitude of construction allowed in wills in furtherance of the testator's intention" (4 Kent, 216), and that "there are several cases in which, in a devise, the words *heirs* or *heirs of the body* have been taken to be words of purchase and not of limitation, in opposition to the rule in *Shelley's Case*. * * * * * Thus it is in the case of a limitation to A. for life *only*, and to the next heir male of his body, and the heirs male of such heir male. * * * * * In such cases it appears that the testator intended the heirs to be the root of a new inheritance or stock of a new descent, and the denomination of heirs of the body was merely descriptive of the persons who were intended to take." 4 Kent, 421.

Slemmer v. Crampton.

The case at bar is clearly within this rule. The real estate was devised to Maria A. Avery for the term of her natural life *only*. During that time she was to occupy and enjoy the same, and at her death the real estate was to "go to the heirs of her body, free of all liens and incumbrances." The intent of the testator to create a new stock of descent at her death is entirely clear.

AFFIRMED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA:

DES MOINES, JUNE TERM, A. D. 1879.

IN THE THIRTY-THIRD YEAR OF THE STATE.

PRESENT:

HON. JOSEPH M. BECK, CHIEF JUSTICE.	
" AUSTIN ADAMS,	} JUDGES.
" WILLIAM H. SEEVERS,	
" JAMES G. DAY,	
" JAMES H. ROTHROCK.	

SEATON V. HIGGINS.

1. **Jurisdiction: PARTY: REPLEVIN.** A person not a party to an action aided by attachment in the Circuit Court, may maintain replevin for the attached property in the District Court.

Appeal from Lee District Court.

TUESDAY, MARCH 18.

ACTION in replevin. The defendant held the property as sheriff, under a writ of attachment issued by the clerk of the

 Seaton v. Higgins.

Circuit Court. The petition so showed. The defendant demurred to the petition on the ground that it showed upon its face that the action is against an officer of another court, which court had jurisdiction in the premises. The court sustained the demurrer, and rendered judgment in favor of the defendant. The plaintiff appeals.

Sprague & Gibbons and *Lee R. Seaton*, for appellant.

Craig & Collier, for appellee.

ADAMS, J.—It seems to be well settled that a State court cannot interfere with the execution of a process from a Federal court. *Taylor v. Carryl*, 20 Howard, 583; *Freeman v. Howe*, 24 Howard, 457; *Buck v. Colbath*, 3 Wallace, 341. The Federal judiciary was established, in part at least, through the supposed necessity of providing for suitors, in a certain class of cases, a tribunal different from the State courts. But if a State court could interfere with the execution of a process from a Federal court, it might render its judgments substantially nugatory.

The District and Circuit Courts of this State derive their powers from the same source, and are instituted for the determination of the same class of cases, neither affording any advantage over the other. It is manifest, therefore, that as between them the same ground of jealousy in regard to interference does not exist as between a Federal and State court. Interference, it is true, as between two co-ordinate courts cannot be allowed to extend to any question drawn directly in issue. That one of two co-ordinate courts which first obtains possession of a controversy must be allowed to dispose of it finally. But in the case at bar the person who is plaintiff was not a party to the action in the Circuit Court, and no question is put in issue which was in issue in that action. We think that the demurrer was improperly sustained.

REVERSED.

Clapp v. Cunningham.

CLAPP V. CUNNINGHAM.

1. **Pleading:** CONFESSION AND AVOIDANCE. An allegation in an answer is to be taken as true when the plaintiff, in reply, pleads in confession and avoidance.
2. ———: ———: BURDEN OF PROOF. Affirmative matter set up in a reply casts upon the plaintiff the burden of proof.

Appeal from Davis District Court.

TUESDAY, MARCH 18.

ACTION at law upon a promissory note. The cause was tried to the court without a jury, and a judgment rendered for defendant. Plaintiff appeals.

J. C. Coad, for appellant.

Traverse & Eichelberger, for appellee.

BECK, CH. J.—I. The answer of defendant pleads two special defenses, namely: *First*, a former adjudication of the same cause of action in the County Court of Buffalo county, Nebraska, a court having full jurisdiction of the parties and subject matter, and judgment against the plaintiff was rendered in the cause, which was between the same parties that are in this suit; *second*, the note is without consideration, and was obtained by fraud, stating the facts upon which this defense is based, which need not here be presented.

To this the plaintiff replied, denying all allegations therein not admitted, and specifically denying the failure of consideration and fraud, pleaded by defendant, and presenting allegations of fact in regard to the transaction out of which the note grew, which need not be repeated here.

To the defense of former adjudication the following reply was made: "The plaintiff, for further reply, says it is true that the cause referred to in the defendant's answer was tried

Clapp v. Cunningham.

in the Nebraska County Court, but says the cause was duly appealed to the District Court of Buffalo county, Nebraska, from the judgment rendered in said County Court, and after said cause was appealed to said District Court, and before said cause was tried, it was dismissed. The plaintiff says there was never any final adjudication of said cause, but that said cause was dismissed before there was any final adjudication thereof."

II. Upon the defense of fraud and want of consideration the court found for plaintiff, and upon the other defense of former adjudication for defendant. It was also found by the court that the allegation of an appeal and subsequent dismissal of the action was not supported by the evidence. Upon these findings judgment was rendered for the defendant.

The errors assigned raise but two questions. The first involves the correctness of the court's ruling in admitting in evidence the transcript of the record presenting the proceedings and judgment in the action, pleaded as a prior adjudication; the other, the sufficiency of the evidence to sustain the findings of the court and the judgment in this case.

III. It is insisted by plaintiff that the transcript of the record was not admissible in evidence, for the reason that it is
1. PLEADING : not attested and authenticated as required by law,
confession and
avoidance. and it fails to show upon its face that the suit in the Nebraska court was upon the same cause of action set out in plaintiff's petition.

We find it unnecessary to determine the question here raised for this reason: "The reply of plaintiff to defendant's answer explicitly admits the proceedings and judgment pleaded as a former adjudication, but sets up in avoidance of the defense the appeal from the judgment and subsequent dismissal of the action. The defendant sets up the judgment as a defense in his answer. The fact relied upon as a defense is admitted in the reply, but its effect is avoided by the allegation of the appeal and dismissal of the suit. The reply is in conformity to Code, § 2665.

Clapp v. Cunningham.

Now a party need not introduce evidence to support an allegation which is admitted in the pleadings of his adversary responding thereto. The allegation is taken as true when an issue thereon is thus waived. In the case before us the proceedings and judgment relied upon by defendant to support his defense were admitted. The allegations of defendant's answer so far should be taken as true. If the defendant introduced incompetent evidence upon the matters admitted by plaintiff this would not destroy the effect of the admission. It would stand. We may, therefore, concede for the purpose of this case, that the evidence objected to was incompetent; yet had it been excluded the court below could not have found differently, for the fact found upon the incompetent evidence is admitted in plaintiff's reply, and the finding would have accorded with the admission. The admission of the evidence, if erroneous, was without prejudice.

IV. The plaintiff was charged with the burden of sustaining the allegations of the matter pleaded in her reply, 2. —: —: ^{burden of} in avoidance of the facts admitted in the reply, ^{proof.} namely, the appeal from the judgment and the subsequent dismissal of the proceeding. Defendant was not required to prove a negative—that no such appeal and dismissal were had. The existence of the judgment is affirmed by defendant and admitted by plaintiff. The appeal and dismissal are pleaded by plaintiff in avoidance of the admitted fact. The plaintiff must support the affirmative allegation of her pleading. But this she utterly fails to do. Nothing whatever is found in the abstract before us showing the alleged appeal and dismissal of the action. The court below could not have found that the allegations of plaintiff's reply were sustained by proof.

The judgment of the court, we think, is supported by the admissions of the pleadings and by the evidence. It must be

AFFIRMED.

/ 50 310
131 325

DEE V. DOWNS ET AL.

1. **Statute of Frauds: PROMISSORY NOTE: DEBT OF ANOTHER.** The statute of frauds will not exempt from liability one who has received a part of the consideration of a note, notwithstanding he was not a signer thereof.

Appeal from Louisa Circuit Court.

TUESDAY, MARCH 13.

THE petition alleges that on the 1st day of December, 1875, C. W. Downs, now deceased, and Charles Downs, executed and delivered to Gertrude Bell their promissory note for seven hundred and fifty-five dollars; that said note was given for money loaned to said C. W. Downs, Charles Downs and Isaiah Downs; that it was agreed and understood by and between said Gertrude Bell and defendants last named that all of said last-named defendants should join in a note to her, and it was part of the consideration upon which said money was loaned that Isaiah Downs should sign the note, and before the loaning of said money he expressly promised and agreed, for and in consideration of the money so loaned, he would sign said note; that before they matured said note and claim against Isaiah Downs were transferred in writing to plaintiff; that he now holds them, and they are due and unpaid. Judgment is asked against C. W. Downs, Charles Downs and Isaiah Downs for the amount so loaned.

The defendant Isaiah Downs, for answer, "denies that he is in any manner indebted on the note or contract copied in plaintiff's petition, or that he ever undertook, promised or agreed to pay said sum of money, or any part thereof; and denies that he is in any manner liable on said note or contract. *Second.* Defendant says that, by plaintiff's own showing to further have and maintain his action against defendant, he ought not, because, as appears by plaintiff's own showing, he seeks to recover of defendant upon a verbal promise to

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answer for the debt of another. Wherefore he prays judgment for costs." The cause was tried by the court, and judgment was rendered against the defendants C. W. Downs and Charles Downs, and in favor of the defendant Isaiah Downs. The plaintiff appeals.

Power & Antrobus, for appellant.

J. & S. K. Tracy and *D. C. Cloud*, for appellees.

DAY, J.—The plaintiff introduced as a witness William Bell, who testifies that he concluded the negotiations for the loaning of the money in question as the agent of the lender. This witness was asked the following questions: "What was said in relation to the loaning of the amount of money that note called for, by whom was it said, and to whom was this money loaned? State whether or not the seven hundred and fifty-five dollars, that is called for by this note, was loaned to C. W. Downs, C. Downs and Isaiah Downs? State whether or not, at the time this money was loaned, it was upon the promise of Isaiah Downs that he would become responsible for its payment, and whether the money was loaned because of that promise? State whether or not the money would have been loaned except for that promise?" To each of these interrogatories the defendant objected that it is irrelevant, incompetent and immaterial. The objections were sustained, and the plaintiff excepted. The petition alleges that the money for which the note was given was loaned to C. W. Downs, Charles Downs and Isaiah Downs. The questions objected to and excluded sought to elicit testimony to establish this allegation of the petition. If the money was in fact loaned to Isaiah Downs he would have been liable to repay the same if no note had been executed.

The fact that C. W. Downs and Charles Downs executed a note for the sum loaned would not exonerate Isaiah Downs from liability, unless the note was taken under such circum-

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stances as to show that credit was extended to C. W. Downs and Charles Downs alone. Suppose that the money was in fact loaned to the three parties named in the petition, and that after the money was delivered to one of the parties Isaiah Downs refused to execute the note. He could not, we think, by such refusal escape liability. In *Van Riper v. Baker et al.*, 44 Iowa, 450, Baker purchased a threshing machine from Van Riper, and executed a note therefor, upon which one Schone was to become surety. Schone agreed to sign the note the next morning, and upon the faith of that promise the machine was delivered. Schone failed to sign the note as he agreed. It was held that he was liable as a surety, and that the promise was not within, nor affected by, the statute of frauds. That case is applicable in principle to this. The court should have allowed the plaintiff to prove that the loan was made in fact to Isaiah Downs, as well as to the other defendants, as alleged in the petition. It is to be observed that the answer does not in terms deny that the loan was made in part to Isaiah Downs. It denies that he is in any manner indebted, and that he undertook or agreed to pay the money, and seeks to avoid liability under the statute of frauds.

The court probably excluded the testimony offered on the ground that defendant could not be held liable unless he undertook in writing to pay the debt. This position is not tenable if the loan was made to the defendant Isaiah Downs, as well as to the other defendants. That it is not necessary that the name of Isaiah Downs should appear on the note in order to render him liable for the consideration advanced, see *Carman v. Elledge*, 40 Iowa, 409; *Van Riper v. Baker et al.*, 44 Id., 450.

REVERSED.

Rankin v. Pitkin.

RANKIN V. PITKIN ET AL.

1. **Election: CONSTRUCTION OF STATUTE.** The word "error," as employed in section 627 of the Code, is used in the sense of excess.
2. ———: **EXCESS OF BALLOTS.** The fact that an excess of ballots appears to have been cast will not authorize the board of supervisors to order a new election for a particular office, for the filling of which no more than the number of legal votes were cast.

Appeal from Van Buren Circuit Court.

TUESDAY MARCH 18.

THE petition states that the plaintiff and R. L. Clarke were candidates for the office of county treasurer at the election held in Van Buren county, in the year 1877, and—

"5. That at the election precinct of Keosauqua, Van Buren county, Iowa, there were cast for said office of county treasurer votes as follows, to-wit:

R. L. Clarke,	-	-	-	-	-	-	-	-	204
Thomas Rankin,	-	-	-	-	-	-	-	-	109
Clark,	-	-	-	-	-	-	-	-	2

"6. That the whole number of voters on the poll lists, as shown by the returns, was three hundred and fifteen; that the whole number of ballots tallied in said precinct were three hundred and eighteen, as is shown by the returns and certificate of the judges of said election precinct; that there were three votes polled and tallied in excess of the voters on the poll lists, which facts are fully certified to, and returned in writing by the judges of said election and duly attested, as by law provided.

"7. That if said R. L. Clarke were deprived of the vote of the said precinct of Keosauqua the said plaintiff would have a majority of the votes for said office."

It is also stated that the board of supervisors proceeded to make the canvass as required by law, and declared the result

Rankin v. Pitkin.

to be that R. L. Clarke was duly elected to said office by a majority of two votes.

The relief asked was that a writ of *mandamus* issue to compel the defendants, the board of supervisors, to order a new election in said precinct. Such relief was granted by the Circuit Court, and the defendants appeal.

Lea & Beaman and Gillmore & Anderson, for appellants.

Trimble & Baldwin and Work & Brown, for appellee.

SEEVERS, J.—The question for determination involves the construction of section 627 of the Code. It provides: "If the
1. ELECTION: ballots for any officer are found to exceed the
construction number of the voters in the poll lists, that fact
of statute. shall be certified with the number of the excess in the return, and if it be found that the vote of the precinct where the error occurred would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurs, and a new election ordered therein;
* * * but if the error occur in relation to a township officer, the trustees may order a new election or not, in their discretion. If the error be in relation to a district or State officer, the error and the number of the excess are to be certified to the State canvassers, and if it be found that the error would affect the result as above, a new vote shall be ordered in the precinct where the error happened, and the canvass shall be suspended until such new vote is taken and returned. When there is a tie vote and such an excess, there shall be a new election as above directed."

It is claimed on the one hand, and, as we think, properly conceded on the other, that the meaning of the word "error," as used in the statute, would be more accurately expressed if the word "excess" had been used. The latter will be, therefore, used hereafter in the place and stead of the former.

That there were three illegal votes cast in Keosauqua pre-

Rankin v. Pitkin.

inct, and if the same are deducted from the votes cast for
2. —: —: R. L. Clarke, as found and determined by the
^{excess of bal-}
^{lots.} board of canvassers, he would not have a major-
ity, must be conceded. It, however, is not certain that any
illegal votes were cast for the office of county treasurer. In
fact it is impossible to ascertain whether any such votes were
cast for any of the candidates for said office. It is made cer-
tain by the allegations of the petition that there were no more
votes cast or counted for the candidates for said office than
there were names of voters on the poll lists.

The question, then, is whether it is the duty of the board
of supervisors to "set aside the election" as to said office,
and order a "new election" in said precinct, unless there was
an excess of ballots as to that particular office.

Much stress is laid by the appellee on the words "any offi-
cer" in the first line of the section above set out in full. He
claims that if "any officer" has an excess of ballots a new
election must be ordered. On the other hand it is insisted
the words aforesaid mean "any officer" for whom the excess
of ballots are cast. In order to determine the proper con-
struction the whole section must be considered. It is pro-
vided: "If the excess be in relation to a district or State
officer the excess and the number of the excess shall be certi-
fied to the State canvassers, and if it be found that the excess
would affect the result as above a new election shall be
ordered."

It is apparent, we think, there must be an excess of ballots
for *some* State or district officer. This much is quite clear.
The language of the statute expressly requires, before a new
election can be ordered as to a State officer, that it must
appear there was an excess of ballots "in relation to a district
or State officer." If it were certified, therefore, to the board
of State canvassers that there was an excess of ballots as to
a county or township officer, or simply that there was such
an excess, without the statement required by the statute that
such excess of ballots was "in relation" to a district or State

Rankin v. Pitkin.

officer, it would not be the duty of such canvassers to order a new election as to any officer who, if the excess were deducted from the votes received by him, would be in the minority.

It is equally clear that, before an election can be ordered as to a township officer, there must have been an excess of ballots "in relation to a township officer."

While the language used in relation to a county officer is not precisely the same as in relation to State or township officers, still we think the meaning is the same. It cannot, with fairness, be claimed that a different construction should be adopted as to State and township officers from what should prevail as to county officers. For such a construction no reason could be given except that the express words of the statute required it.

It is quite clear, from what has been said, that a mere excess of ballots does not vitiate the election. Something more than this is required. Recurring, then, to the first line of the section and to the words "any officer," we are of the opinion that such designation refers to any district, State, county or township officer, and that "any officer" means any one or more of the several classes for whom there is found to be an excess of ballots. In other words, "any officer" means such officer or officers for whom an excess of ballots are cast. In such case the statute does not require, before a new election is ordered, that it should be made to appear the officer having the majority received any of the ballots so cast in excess of the names on the poll list. But it is conclusively presumed such excess was cast for him, and if it changes the result a new election must be ordered.

The correctness of this construction is aided by the thought that if the legislative intent had been to invalidate an election in case there was an excess of ballots, without reference to what officer the same were cast for, the language used to express such intent would probably have been as follows: "If the ballots are found to exceed," etc. The insertion of the words "any officer" after ballots changes the meaning of

The State v. Painter.

the sentence quite materially, and aids, we think, the construction we have adopted.

The foregoing views render it unnecessary to determine the other questions discussed by counsel, and also render it unnecessary to refer to the vote in Hamburg township. The result is, the judgment of the Circuit Court is

REVERSED.

THE STATE V. PAINTER.

1. **Criminal Law: SEDUCTION: CORROBORATIVE EVIDENCE.** Proof of opportunity for having sexual intercourse does not constitute evidence corroborative of the prosecution upon a trial for seduction. The evidence, to be corroborative, must tend to connect the defendant with the commission of the offense.

50	317
79	740
50	317
88	256
50	317
106	189
50	317
111	698
50	317
133	745

Appeal from Wapello District Court.

WEDNESDAY, MARCH 19.

INDICTMENT for seduction. There was a verdict of guilty, judgment, and the defendant appeals.

Morris J. Williams, for appellant.

J. F. McJunkin, Attorney General, for appellee.

SEEVERS, J.—I. Certain letters claimed to have been written by the defendant to the prosecutrix were introduced in evidence by the State for the purpose of corroborating the prosecutrix. Whether these letters or some of them were written by the defendant was a controverted question before both the court and jury. Sufficient proof for that purpose having been made, the court permitted the letters to go to the jury as evidence, and instructed them as follows:

“If you believe from all the evidence before you, and from the subject-matter of the letters, that any letters in evidence

The State v. Painter.

were dictated by him and embody his thoughts, and were designed to be communicated to Anna Leonard, then they may be considered, though you may not find they were actually written by him; but if you find that any of the letters in evidence were forged, or written without the knowledge of defendant, then he is not responsible for the contents of such letters, and they should not be considered by you. You are the judges of all these matters, for the law is that these letters, like any other evidence offered, are, in the first instance, before they go to you, subject to objection, as not competent or proper evidence for you to consider at all, and that objection is made to the court, and when the court allows them to go to you, you are to consider them just as you consider any other evidence—just as you do what a witness swears on the stand; that is, you will give them just the weight and value you think they are entitled to in regard to aiding in the establishing of the truth of any of the issues in the case. You know that there is some evidence competent, and that goes before you, that you think of not much weight, or that is entitled to much, if any, credit, and there is other evidence that you think of great weight and entitled to full credit. So these letters are before you, and you are the judges of their weight and value as evidence to sustain the issues in this case.”

Taking this instruction as a whole, we think the court took from the jury the question as to the authorship of the letters. It is true they were told that if they found any of the letters were forged, or written without the knowledge of the defendant, he was not responsible for the contents of such. This, however, is followed by the direction that, inasmuch as the letters have been admitted in evidence, they are to consider them just as they would any other evidence, or that of a witness testifying on the stand, giving thereto such weight as they believed them entitled to; and the instruction concludes as follows: “So these letters are before you, and you are the judges of their *weight* and *value* as evidence to

The State v. Painter.

sustain the issues in the case." This instruction was, we think, prejudicial to the defendant.

II. The jury were also instructed as follows:

"The corroborative testimony required should be of a character to strengthen the testimony of the injured party and tending to point out the defendant as having committed the offense. This corroborative evidence may consist of any facts coming from sources other than from the injured female—such as the defendant being with her, having opportunities to have intercourse with her, the length of time the parties have been acquainted, their relations in life toward each other, any and all letters, if any, written by the defendant."

1. CRIMINAL
law: seduc-
tion: corrob-
orative evi-
dence.

Under this instruction the jury were warranted in finding that mere opportunity to have sexual intercourse and acquaintance were sufficient as corroborative evidence. The opportunity to have sexual intercourse does not, we think, constitute the opportunity required to commit the crime of seduction. Sexual intercourse does not constitute the crime. Seductive means must be used to accomplish the intercourse, and the opportunity must be sufficient for such purpose.

The evidence must tend to connect the defendant with the commission of the offense. It must point or single him out from other men. If acquaintance and opportunity constitute the corroborative evidence required by the statute, it may with safety be asserted that there are a score or more of men who could have been charged and convicted with as much propriety as the defendant. The corroborative evidence referred to in the instruction would have been just as applicable, at least, to many of the male acquaintances of the prosecutrix as to the defendant. Something more than this is required. *State v. Danforth*, 48 Iowa, 43.

If there were a promise of marriage, the birth of a child, the defendant a constant visitor, etc., in addition to opportunity, it would be sufficient, as was held in *State v. Wells*, 48, Iowa, 671. The character of the offense is such that other

Knox v. Buffington & Co.

corroborative evidence cannot well be obtained. From necessity it must, therefore, be held sufficient. But beyond *The State v. Wells* we are unwilling to go. To do so would ignore the statute. This the instruction in question practically does, and is, therefore, erroneous.

REVERSED.

KNOX V. BUFFINGTON & CO. ET AL.

1. **Partnership: POWERS OF PARTNERS: CONTRACT.** If a party dealing with a partner has notice of a restriction upon the general powers of the partner, he cannot subject a copartner to liability upon a contract entered into in violation of such restriction.

Appeal from Louisa Circuit Court.

WEDNESDAY, MARCH 19.

ACTION upon a promissory note for one hundred and seventy-five dollars, executed by J. Q. Buffington & Co., payable to the order of W. C. Knox & Son. The copartnership of J. Q. Buffington & Co. was composed of J. Q. Buffington and H. C. Wortham. Wortham answered for himself and also for the partnership, averring that said note was given for certain machinery attached to the flouring mill belonging to said partnership, and that he, said Wortham, never consented to said purchase, but positively refused, and so notified the plaintiff before said purchase was made; that with full knowledge of such refusal to purchase the plaintiff sold said machinery to said Buffington, who, in fraud of the rights of defendant Wortham, executed the said promissory note, and that said defendant never received any consideration therefor. There was a trial by the court and a judgment for the defendants. Plaintiff appeals.

Knox v. Buffington & Co.

G. W. Watters, for appellant.

R. H. Hanna and Tatlock & Wilson, for appellees.

ROTHROCK, J.—It is conceded that the partnership firm of J. Q. Buffington & Co. consisted of J. Q. Buffington and H. C. Wortham, and that the business of the partnership consisted in operating a flouring mill owned by the firm. The machinery in question was placed in said mill on trial, before the said partnership was formed, and while the said mill was owned by other parties.

1. PARTNER-
SHIP: powers
of partners:
contract.

We think the court was warranted in finding from the evidence that, at about the time the note was given, the plaintiff appeared at the mill, claiming that the machinery had been sold, and not left on trial. This claim seems to have been abandoned and plaintiff proposed to sell to Wortham. . Wortham told him he would not buy, and that he and Buffington could not run the mill in partnership, and offered to stop the mill and set the machinery out. Wortham was then negotiating a sale of his interest in the mill to Buffington, and told him if he wished to purchase the machinery to do so, but that he (Wortham) would have nothing to do with it. Buffington afterward made the purchase and executed the note in suit, but without the knowledge of Wortham, who in a short time after that sold out his interest in the partnership to Buffington. In the sale no account was taken of said machinery, and Wortham did not know that a partnership note had been given until after he sold his interest in the mill and until after said note became due. It is true there is a conflict in the evidence as to Wortham's refusal to make the purchase, and as to his knowledge that a partnership note had been given. It is not our province, however, to determine the credibility of the witnesses where there is a conflict in their testimony, and we cannot say that the court did not find these questions of fact correctly.

That the purchase of the machinery was within the scope

Ind. School Dists. of Graham Township v. Ind. School Dist. No. 2.

of the partnership business is not denied. In the absence of a refusal upon the part of Wortham to make the purchase, or of notice to the plaintiff of such refusal, there can be no doubt that the purchase made by Buffington would have been binding upon the partnership and upon the individual members thereof.

But here was an express restriction of the general powers of Buffington, of which the plaintiff had notice when he sold the machinery. Under such circumstances we think he could not by his act bind his copartner. "If the party dealing with a partner has knowledge of any restrictions of the general powers of the partner, as between him and his copartners, he will be bound by them, and he cannot insist upon his acts under the general powers of a partner in violation of such restrictions." 5 Wait's Actions and Defenses, 126; Collier on Partnerships, § 387, *et seq.*; *Boardman v. Gore*, 15 Mass. 339; *Leavitt v. Peck*, 3 Conn., 125.

AFFIRMED.

INDEPENDENT SCHOOL DISTRICTS, ETC., OF GRAHAM TOWNSHIP,
v. INDEPENDENT SCHOOL DISTRICT NO. 2, ETC.

1. **Parties: MISJOINDER OF: PRACTICE.** A misjoinder of parties is assailable by motion to compel the party in error to elect.
2. ———: ———. Several parties asking relief in different amounts, and requiring a distinct and separate judgment to be rendered in favor of each, cannot unite in one action against the party from whom the relief is sought.

Appeal from Johnson Circuit Court.

WEDNESDAY, MARCH 19.

THE plaintiffs are eight independent school districts of Graham township, Johnson county. This action was brought to recover of the defendant, an independent school district in

50	322
82	640
50	322
109	411

Ind. School Dists. of Graham Township v. Ind. School Dist. No. 2.

said township, certain sums of money which it is claimed are due the plaintiffs respectively. It is averred that while the organization as a district township existed it was the custom for each sub-district to pay the expense of building its own school-house, and that while it was so organized a school-house was built in said district No. 2, and that the cost thereof was unpaid; that an action was brought therefor against the district township, and judgment was rendered requiring the township to pay such cost, amounting to two hundred and eighty-one dollars and fifty-four cents; that a *mandamus* was issued requiring a tax to be levied upon the entire township to pay said sum, which tax was levied after the organization of the independent districts, and said districts paid their proportionate shares, as follows: Independent district No. 1, \$35.35; No. 2, \$41.75; No. 3, \$21; No. 4, \$22.25; No. 5, \$33.52; No. 6, \$34.32; No. 7, \$42.88; No. 8, \$26.02; No. 9, \$26.80; that it was the duty of said district No. 2 to pay the entire cost of building said school-house, but it has paid only forty-one dollars and seventy-five cents, and refuses to pay to or reimburse the plaintiffs for the amounts paid by them respectively.

Each of the independent districts named as plaintiffs, prayed judgment against defendant for the amounts paid by them respectively.

The defendant filed the following motion:

"1. Defendant moves the court to require the parties plaintiff to elect which of them will proceed and prosecute this action; and—

"2. Moves to strike out all parties except one, and to dismiss said cause as to all except one of said plaintiffs, for the reason that it is shown that each one of said plaintiffs is a separate and independent corporation, and their action or cause of action, if any they have, is to each separate and independent.

"There is a misjoinder of parties."

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Afterward the court made the following

"ORDER.

"It is ordered that the motion be sustained; that plaintiffs have leave to amend, if so advised, by bringing separate suits, if so advised, without service of further notice on defendant; or, if so advised, plaintiffs may amend their petition, uniting as plaintiff asking an accounting and decree against defendant by equitable action."

Plaintiffs excepted, and appeal.

Younkin & Younkin and *Geo. B. Edmonds*, for appellants.

Boal & Jackson, for appellee.

ROTHROCK, J.—I. The point is made that a motion is not allowable where there is a misjoinder of parties, and that the petition should have been attacked by demurrer.

1. PARTIES: misjoinder: practice. That a motion is the correct practice, see *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 44 Iowa, 512; *King v. King*, 40 Id., 120; *Beckwith et ux. v. Dargets*, 18 Id., 303.

II. In *Skiff v. Cross*, 21 Iowa, 459, it was held that sureties might properly unite as plaintiffs in an action against their principal to recover money paid for the principal,

2. —: —. each surety having paid an equal amount. In the case at bar the plaintiffs claim in separate and different amounts, not as sureties, but upon an implied contract, equitably arising upon paying that which it is averred the defendant should have paid. We do not think the plaintiffs can join as plaintiffs even though they should denominate this as an equitable action. It is purely a law action. No accounting in equity is necessary. The action is for the proportionate shares of the judgment which plaintiffs have ascertained and stated, and they demand judgments in specific sums for the several amounts due each district. This would involve

Evans v. Montgomery.

the rendering of eight judgments in one action. It may also involve as many issues as there are parties plaintiff. We do not think our system of practice contemplates such confusion in the trial of issues as this must necessarily produce.

We are aware that there are some authorities that seem to allow a joinder of plaintiffs where the same results must follow, but we think it better not to allow such rule to prevail in this State. See *Bort & Baldwin v. Yaw*, 46 Iowa, 323.

AFFIRMED.

EVANS V. MONTGOMERY ET AL.

1. **Contract: RESCISSION: FRAUD.** An action for the rescission of a contract on the ground of fraud must be commenced within five years from the time of the discovery of the fraud; and the defendant, in pleading the statute, is not bound to show a continuous residence in the State during that period; but the plaintiff, if he seek to avail himself of the exception thereto, has the burden of bringing the case within it.
2. **Partnership: FIRM ACCOUNTS.** Where a partner had collected accounts in favor of the firm, without making any entry of the amounts so collected, it was *held* that where the amount of such collections was ascertained he was properly chargeable therewith.
3. ——— : ——— : **FAILURE TO KEEP.** While the failure to keep accounts by the partner in charge of the partnership concerns might render an adjustment difficult, yet it could not be taken advantage of by a copartner who had commenced an action and asked an accounting.
4. **Contract: RESCISSION.** A party who has recognized the validity of a contract, after the discovery of an alleged fraud in its inception, cannot afterward maintain an action to rescind it on the ground of such fraud.

Appeal from Mahaska District Court.

WEDNESDAY, MARCH 19.

THE plaintiff and defendants entered into articles of copartnership, as follows:

50	325
111	253
50	325
116	274
50	325
130	629
50	325
132	86
50	325
142	403

Evans v. Montgomery.

“Article of agreement made and entered into this 20th day of October, A. D. 1869, by and between John Montgomery and Andrew McKey, of the county of Mahaska and State of Iowa, of the first part, and E. J. Evans, of the county and State aforesaid, of the second part—

“*Witnesseth*: That the said John Montgomery and Andrew McKey have bought of John White, of the county and State aforesaid, the property which is immediately and particularly described in a certain bond executed by John White and attested by John Warren, and bearing date of January 21, 1869, for which they agree to pay said John White the sum of twenty-eight thousand two hundred and twenty-five dollars, as is particularly described in the bond above referred to. Now, the said E. J. Evans, having by this writing agreed to assume one-half the liabilities of the said John Montgomery and McKey to the said White, and upon the payment of which sum it is hereby expressly agreed by the said John Montgomery and Andrew McKey that the deed of conveyance from John White, in whom the fee exists, shall be made to John Montgomery, Andrew McKey, and E. J. Evans, jointly, Evans holding a half-interest. It is understood that the interest already accrued upon the note referred to shall be paid by Montgomery and McKey.

“It is further agreed that the said E. J. Evans is to assume and pay one-half of the liabilities of the said Montgomery and McKey, as is shown by the books; and in consideration of E. J. Evans’ assumption to pay, he is, by virtue of this article, entitled to and is now in possession of one-half of the assets of Montgomery and McKey, which are enumerated upon the books. It is understood that the profits and losses shall be mutual.”

This action was commenced on the 27th day of July, 1875. The plaintiff filed an original petition, and a first and second amendment thereto. The original petition alleges, in substance, that defendants, in order to induce plaintiff to enter into said contract, falsely and fraudulently represented that

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the title to the real estate referred to in said contract was in White, and that the defendants' assets exceeded their liabilities in the sum of seven thousand one hundred and sixty-seven dollars and seventy-three cents, when they well knew they were insolvent, and the title to said real estate was not in White, but in one Benjamin Roop. The first amendment to the petition alleges that at the time plaintiff entered into said contract of partnership Benjamin Roop was a silent partner with Montgomery and McKey, which fact they fraudulently concealed from plaintiff, and of which plaintiff had no knowledge until in 1872. The second amendment alleges that Montgomery fraudulently waived all defenses to a note for ten thousand dollars which White held against the firm of Evans, Montgomery & McKey, and permitted him to take judgment thereon. The final prayer for relief is as follows:

"1. The plaintiff prays the court that the contract described as exhibit "B" to plaintiff's petition may be rescinded by the decree of this court, and that plaintiff may have judgment for all moneys and property, or the value thereof, that he has paid into said firm, and on the said property and interest thereon to-wit: the sum of ten thousand dollars and costs of suit; and that the court adjudge and decree that, as between the said John Montgomery and Evans, the said E. J. Evans shall be considered simply as surety for John Montgomery on all the indebtedness of Montgomery & Co., and that all the rights and relations of principal and surety shall exist between them as to said indebtedness—the said John Montgomery to be considered the principal, and the said Evans surety for him, and for such other and further relief as shall be equitable in the premises.

"2. That if plaintiff is not entitled to a rescission of the contract, then plaintiff asks the court to decree that said partnership is dissolved, and that an account be taken of the partnership business, and that he may have judgment against the defendant John Montgomery in the sum of ten thousand

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dollars and costs of suit, and for such other and further relief as may be equitable in the premises."

The defendant John Montgomery answered the original petition, denying all fraud, and alleging that all claims on account of fraud are barred by the statute of limitations. The answer further alleges that under the agreement plaintiff became indebted to defendant Montgomery, when the agreement was executed, in the sum of two thousand five hundred and ninety-three dollars and twenty-five cents, and has since become indebted in the sum of seven thousand one hundred and fifty-two dollars and sixty-two cents, and interest. Montgomery asks that there may be an accounting between himself and plaintiff, and between himself and his co-defendant McKey, and that he have judgment against plaintiff for twelve thousand dollars. Montgomery also answered, denying the allegations of the amendments to the petition. Afterward Montgomery dismissed, without prejudice, his claim for an accounting between himself and McKey.

The cause was referred to C. P. Searle, Esq., to find and report the facts, and state the accounts between the parties. The referee reported the facts and found the following conclusions of law: *First*, that the parties hereto, plaintiffs and defendants, have rescinded the contract described as exhibit "B" of the petition, and abandoned the property so far as the real estate is concerned; *second*, that the plaintiff did not, upon the discovery of fraud, at once announce his purpose to rescind the contract and adhere to it; that his cause of action is barred by the statute of limitations. The referee recommended that both the petition and the cross-petition be dismissed. Both parties excepted to this report. The court submitted the case to the referee for further report, and for a statement of the account of the partnership.

The referee submitted a second report, containing an account of the partnership affairs, and recommending a judgment in favor of the defendant Montgomery against the plaintiff for one hundred and thirty-eight dollars and twenty-two cents.

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The court again submitted the cause to the referee, with direction to modify the report. The referee thereupon submitted a supplemental report, finding the amount due from plaintiff to the defendant Montgomery to be one thousand one hundred and ten dollars and seven cents, and recommending that defendant have judgment for that amount. The defendant moved to set aside all the reports, and for judgment against plaintiff on several items which the referee had disallowed. The plaintiff moved the court as follows:

"1. To confirm the facts found by the referee in his three reports.

"2. To set aside the recommendation of the referee for judgment against the plaintiff, for the reason that the same is contrary to the pleadings, and the facts found by the referee.

"3. To adjudge and decree—*First*, that the contract between plaintiff and defendants be rescinded; *second*, that plaintiff have judgment against the defendant John Montgomery, dismissing his counter-claim on the merits, and for five thousand dollars, for the reason that the pleadings and facts found by the referee show that plaintiff is entitled to this relief."

The court overruled the plaintiff's motion, and so far sustained the defendant's as to render judgment in favor of defendant for two thousand three hundred and twenty-two dollars and forty-five cents. The plaintiff alone appeals.

Williams & McMillen, for appellant.

John F. Lacey and *M. E. Cutts*, for appellee Montgomery.

DAY, J.—I. The parties have abandoned the contract so far as relates to the purchase of real estate referred to in it. The real estate has been sold in full satisfaction of the debt contracted in its purchase. No question pertaining to this real estate is involved in the case.

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II. The plaintiff moved to confirm the facts found by the referee in his three reports. No question, therefore, can
1. CONTRACT: now be made as to the correctness of the facts
rescission:
fraud. reported. The referee reported in substance that in 1865 Benjamin Roop commenced the erection of a mill and distillery upon the real estate described in the petition, of which he was the absolute owner, but being involved in debt he caused the legal title to be kept in the name of John White, to conceal the same from creditors, and to secure White for twenty-five thousand dollars, moneys advanced to complete the mill and distillery, and operate the same; that the mill and distillery were substantially completed in 1868, and in January, 1869, Benjamin Roop and John White sold to John Montgomery and A. W. McKey said real estate, together with the mills, distillery, improvements and appurtenances, and Roop, Montgomery & McKey formed a partnership to run and operate the property—Roop being a silent partner, but his interest not determinable from the evidence; that the defendants, Montgomery and McKey, induced the plaintiff to enter into the contract described as exhibit “B,” by representing that John White was the absolute owner of the said property and the fee was in him, and that the partnership assets exceeded the liabilities seven thousand dollars, and by concealing from plaintiff the interest of Benjamin Roop in said property and firm.

The referee also reported the following facts:

“5. In making such statement it is not clear from the evidence that the defendants fraudulently misrepresented the assets and liabilities; yet, one thing is certain, the defendants were sadly mistaken, as the assets did not exceed their liabilities in any sum, but the concern was bankrupt at the time, and defendants ought to have known it.

“6. That at the February Term, 1870, of the District Court of Mahaska county, Iowa, a decree was rendered in a cause described in plaintiff’s petition entitled *Phillips v. B. Roop et al.*, which decreed the fee of said real estate to be in

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Benjamin Roop, and the said John White held only a mortgage interest in it, and the property subjected to a lien of five thousand dollars in favor of Phillips.

"7. That soon after this decree came out, in the spring of 1870, Benjamin Roop told this plaintiff that he, Roop, owned one-half interest in all the said mill property; that Montgomery and McKey had sold their interest to plaintiff, and they were out; and that Roop and Evans were the owners of the property, and the defendant Montgomery could not tell plaintiff what interest he had sold him—whether one-half or one-fourth. The plaintiff had, also, by this time discovered that their personal assets were not so large and the liabilities larger than had been represented to him; therefore, plaintiff came to the conclusion that he had been defrauded, and in the latter part of May, 1870, so informed the defendants, withdrew from the firm, and left the property in the hands of defendants, and has had nothing to do with the same since that time."

"12. That while it is true that in May, 1870, plaintiff abandoned the property, leaving the same in the hands of defendants, yet there is no evidence to show that he ever tendered back to defendants the contract or a deed of conveyance, but on the other hand made several attempts to settle, and offers of compromise, playing fast and loose, holding himself in position to jump either way, in or out, as the wheel of fortune might turn."

In his second report the referee explained his twelfth finding of fact as follows: "That Mr. Evans, after he says he had concluded that the defendants had defrauded him, not only as to the real estate but as to the partnership matters, did not at once announce his determination to rescind the contract and adhere to it, as the law contemplated, but at different times made offers of compromise, offering to lose all he had put into the concern if defendants would release him from further liability, but was all the time in such a position that, if the wheel of fortune had made the real estate

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valuable or the business profitable, he could have jumped in and taken advantage of the fortune."

From this finding of facts it appears that, before the latter part of May, 1870, the plaintiff had knowledge of whatever fraud was perpetrated. This action was commenced on the 27th day of July, 1875—more than five years after the discovery of the fraud. Whether the cause of action, for rescission of the contract on the ground of fraud, accrued when the fraud was perpetrated or when it was discovered, it is alike barred by the statute of limitations. See Code, §§ 2529 and 2530. The plaintiff claims, however, that the statute of limitations was pleaded only to the original petition, and not to the amendments thereto, and that hence the statute of limitations cannot avail as to the alleged fraud in concealing the fact that Roop had an interest in the partnership of Montgomery and McKey. It does not appear that this question was raised in or presented to the court below. It is true the plaintiff, in his exceptions to the report of the referee, says that the second conclusion of law is not sustained by sufficient evidence, and is contrary to the evidence and the pleadings. But this objection applies to the second conclusion of law as an entirety. It does not suggest any difference in this legal conclusion as applied to the original petition and the amendment thereto, nor does it intimate to the mind of the court that this legal conclusion was not applicable to the amendment, because no plea of the statute of limitations was made thereon. If such objection had been distinctly raised the answer might have been amended in the court below. This objection is purely technical.

The original petition alleges that a fraud, in certain respects named, was perpetrated when the contract of partnership was procured. The answer avers that the cause of action growing out of the alleged fraud is barred by the statute of limitations. The amendment to the petition alleges the perpetration of another particular act of fraud at the time referred to in the original petition. The original answer

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seems to have been treated by referee and court as applying to this amendment. As no question that it so applied seems to have been made in the court below, that technical objection ought not to prevail when made for the first time here. It is further claimed by plaintiff that in order to sustain the plea of the statute of limitations it must affirmatively appear that the defendant Montgomery has resided in this State continuously since 1870. The cause of action arose when the fraud was perpetrated, or when it was discovered. The rule is that then the statute of limitations began to run. The exception is that the time during which a defendant is a non-resident shall not be included in computing the period of limitation. Code, § 2533. The burden of establishing this exception is upon the party who invoked its aid.

The case of *Harlin v. Stevenson*, 30 Iowa, 371, relied upon by plaintiff on this point, is not applicable. That was a case where the cause of action arose when the fraud was discovered. From that time the statute began to run. Of course, a party who claims the benefit of the statute of limitations must show when the cause of action arose. If this could not be done without showing a discovery of fraud, the burden of proof is upon him to show such discovery. The difference between that case and this is very apparent. The court properly dismissed plaintiff's action for rescission of the contract of partnership.

II. In his second report the referee charged Montgomery with three thousand six hundred and ninety-four dollars. 2. PARTNER- and eighteen cents—the amount of book-account
SHIP: firm
accounts. which was good at the time Evans went out of the firm, in May, 1870. Respecting this, in his third report, the referee made the following finding of facts:

“The court having found in the last report heretofore filed that the charge against Montgomery of three thousand six hundred and ninety-four dollars and eighteen cents is an error, as shown by the facts found, I report that there is but little evidence as to the actual amount collected by Mont-

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gomery after Evans went out. It shows that there was outstanding on the books accounts to the amount of nine thousand five hundred and forty-six dollars and eight cents, and of that amount good and collectible four thousand four hundred and ninety-one dollars and seventy-eight cents; that from that amount I deducted in my former report the sum of seven hundred and ninety-seven dollars and fifty-five cents, as expense paid out by Montgomery in closing up the affairs of the firm. I find that the evidence positively shows only in items of the amount collected to be about one thousand two hundred dollars over and above the amount allowed as expense of winding up the concern; but I find, as heretofore stated, that Montgomery, after Evans left the firm, was in the habit of collecting and settling accounts, and making no entry whatever of the transaction; that plaintiff, on cross-examination of Montgomery, asked him to make out a statement of all firm moneys collected since Evans left the mill, but it was not done, as he said it would take a long time and be difficult to do. Plaintiff next asked Montgomery to make a list of the accounts of all the responsible parties that have not been collected or settled in some way; when Montgomery gave a list, as near as he could, amounting to sixty-nine dollars and forty-four cents. I, therefore, conclude, and the presumption of law is, that Montgomery has had the benefit of all of said good accounts charged to him in my former accounts, less the sixty-nine dollars and forty-four cents; the amount charged to Montgomery, as the account now stands, being three thousand six hundred and twenty-four dollars and seventy-four cents."

The defendant moved the court "to strike out the sum of three thousand six hundred and twenty-four dollars and seventy-four cents charged against Montgomery, for the finding shows that this item is presumed and not proven, and that the referee's report shows that said claim and no part thereof has been proven, and no items thereof are reported by

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the referee to have been collected, and the report shows that they were not collected."

The court rendered judgment in favor of defendant for two thousand three hundred and twenty-two dollars and forty-five cents, instead of for one thousand one hundred and ten dollars and seven cents, as recommended by the referee. While the decree does not show how the amount of the judgment was reached, yet it is apparent from the record that it was done by charging Montgomery with one thousand two hundred dollars on accounts collected, instead of with three thousand six hundred and twenty-four dollars and seventy-four cents.

It is to be observed that defendants' objection to this branch of the referee's report does not assail the correctness of the facts found, but claims that from the facts found the charge against Montgomery is incorrect. We think the court erred in modifying the report in this respect. If Montgomery collected and settled accounts without making an entry of the transaction, and was able to show that only sixty-nine dollars and forty-four cents remained uncollected out of four thousand four hundred and ninety-one dollars and seventy-eight cents of good and collectible accounts, he was, we think, properly charged with the balance.

III. Plaintiff claims that the failure of Montgomery, both before and since the dissolution, to keep an account of the 3. ____: ____: transactions with the partnership property, in failure to keep. connection with his neglect to make an inventory of the property when plaintiff left the firm, has rendered it impossible to state the accounts between the parties, and hence no action can be maintained on the partnership account. The plaintiff commenced this action, and asked an accounting. If the balance had been found in his favor it is safe to assume that no such objection as this would have been interposed. While the failure to keep accounts renders an accurate adjustment between the parties difficult if not impossible, it will not do to say that no adjustment can be made because it is difficult, nor that no settlement will be had

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because it may not be absolutely correct. Ordinarily, in the settlement of complicated accounts, it is practicable only to approximate correctness. The law never refuses redress because absolute certainty cannot be attained.

IV. The plaintiff complains of some of the credits allowed Montgomery. The referee reported that "as to the partnership account I have found it exceedingly difficult to make an equitable adjustment, from the manner in which the business was carried on, and the conflict in the testimony." As we have before stated the plaintiff moved to confirm the facts found by the referee in his three reports. We are, therefore, confined in our examination to the facts reported. From these we are unable to discover affirmatively that Montgomery has been allowed any credits to which he was not entitled. We are unable to assign any reason for any modification of the recommendations of the referee's report, accepting as the basis thereof the facts found.

The defendant should have judgment only for one thousand one hundred and ten dollars and seven cents. He may have judgment for that amount in this court if he so elect.

REVERSED.

ON REHEARING.

BECK, CH. J.—Upon petition of appellant a rehearing was granted in this case, and it has again been submitted to us upon a re-argument.

It will be observed that plaintiff claims that he is entitled to recover for all money or property paid by him into or for the firm, for the reason that, being induced to enter into the contract by fraud, he has the right to rescind it, and a decree should be entered setting it aside. Our former opinion holds that the relief sought—the rescission of this contract—cannot be granted, for the reason that the fraud upon which plaintiff bases his right to this relief was discovered more than five years before this action was commenced, and the relief by a

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decree rescinding the contract is, therefore, barred by the statute of limitations.

Upon a re-examination of the case, on the petition for rehearing, we discovered that the statement of fact as to the time of the discovery of the fraud is incorrect, and that the relief was not, therefore, barred by the statute. Thereupon we ordered a rehearing.

After a careful reconsideration of this case we are satisfied that the conclusion we reached in the foregoing opinion is correct, though not based upon the true reason.

The fraud complained of by plaintiff was discovered as early as 1872, according to the admission in the argument of his counsel. This action was commenced in 1875.

4. CONTRACT:
rescission.

After the discovery of the fraud, and before the institution of the suit, plaintiff gave to the defendants no notice of his intention to rescind the contract, or that he regarded it as rescinded, and that he considered himself not bound by it, but on the contrary recognized its validity by offers to defendants to surrender all he had paid upon the contract, in consideration that they would release him therefrom. Upon this state of facts plaintiff is not entitled to a rescission of the contract. His right to such relief was lost by delay in pursuing his remedy. The law required him, upon discovering the fraud, to announce and adhere to his purpose of rescinding the contract. This announcement should have been made, certainly, within a reasonable time. A delay of two or three years, and acts and declarations inconsistent with such intention, would raise the legal presumption that he ratified the contract and waived all rights to rescind it. *Rawson v. Harger*, 48 Iowa, 269; *Grymes v. Sanders et al.*, 93 U. S., 3 Otto, 55; 2 Parsons on Contracts, 278.

We find no grounds, upon our re-examination of the case, which will support a doubt of the correctness of the conclusions announced in the foregoing opinion upon other branches of the case. We adhere to our former opinion, and the judgment heretofore entered will stand undisturbed.

SMALL v. THE C., R. I. & P. R. Co.

1. **Railroads: LIABILITY FOR FIRES: NEGLIGENCE.** Section 1289 of the Code, providing that railway companies "shall be liable for all damages by fire that is set out or caused by the operation" of their roads, does not create an absolute liability, but makes the fact of an injury so occurring only *prima facie* evidence of negligence, which may be rebutted by proof of freedom from negligence

Argument 1. The statute provides that the manner of recovery shall be the same as for injury to stock, but in the latter case the company can escape liability by showing freedom from negligence.

Argument 2. Exposure to fire is a part of the injury for which right-of-way damages are allowed, and it is presumed to be paid for when such damages are paid.

Argument 3. Where a statute is of doubtful construction the public interest should be considered, and public interest would forbid the making of railway companies absolute insurers for all the property which may happen to be destroyed by fire set by the operation of their roads.

Argument 4. At common law the doctrine prevailed in this State that contributory negligence would defeat a recovery for property destroyed by fire set by a railway company. BECK, CH. J., and DAY, J., *dissenting*.

Appeal from Poweshiek Circuit Court

WEDNESDAY, MARCH 19.

ACTION to recover for an elevator and other property burned by a fire alleged to have been caused by the operating of the defendant's road. There was evidence tending to show that sparks from one of the defendant's engines set fire to an elevator belonging to some person other than the plaintiff, standing about twenty feet from the road. From this elevator the fire was communicated to the plaintiff's elevator standing about seventy feet therefrom. There was a general denial by the defendant, and evidence was introduced by it tending to show that there was no want of care upon its part, and that the fire was not caused by the operating of its road.

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There was a trial by jury, and verdict and judgment for the plaintiff. The defendant appeals.

Wright, Gatch & Wright, for appellant.

Fairall, Bonorden & Ranck, for appellee.

ADAMS, J.—An opinion was filed in this case, in which the writer hereof concurred, affirming the judgment of the Circuit Court—Justices SEEVERS and ROTHROCK dissenting. Afterward a rehearing was granted, and the case has been reargued with the learning and ability commensurate with its importance.

The question presented is as to whether the defendant is absolutely liable, without regard to negligence, if the fire was set out by sparks escaping from one of its engines, or whether its liability must be based upon negligence; the fact of the injury, however, if occurring as alleged, being *prima facie* evidence of negligence. The question is to be determined by the construction of a statute. The court below held, and so instructed the jury, that, under the statute, the liability was absolute.

At the time the statute was enacted the question had often been raised whether the fact of injury by escape of sparks from a railroad locomotive should not be regarded as *prima facie* evidence of negligence at common law. In several of the States it was held that it should. The reason given for imposing upon the company the burden of proving that it has exercised due care is that the company knows or should know precisely what care it has exercised, and has the means of proving it. The person injured has not ordinarily the same knowledge nor means of proof. In this State, however, it was held that the burden was upon the plaintiff to establish negligence, and that, too, by evidence other than the mere fact of the injury by escape of sparks. See *Gandy v. The C. & N. W. R. Co.*, 30 Iowa, 420, and authorities collated upon both sides. Such, then, at the time the statute was enacted was the rule in this State.

1. RAILROADS:
liability for
fires: negli-
gence.

In the conflict of decisions other States had adopted by statute the rule which imposes upon the company the burden of proving care. It is contended by the appellant that our Legislature, influenced by the same considerations, has merely fallen into the general course of legislation upon this subject, and adopted the same rule. The position is plausible, at all events, and we state it as an introduction to our examination of the statute, which must show by its own terms, interpreted in the light of the considerations which are applicable, whether the Legislature designed to effect a more radical change.

Section 1289 of the Code provides for a liability for stock injured or killed by reason of a want of a fence where the company has a right to fence. It provides that where stock is injured or killed by reason of a want of such fence, the owner may recover by merely showing the injury or destruction of the property. It also contains a provision which is in these words: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock."

The question as to whether this statute creates an absolute liability, or only makes the fact of the injury *prima facie* evidence of negligence, has never been determined by this court. In *Rodemacher v. The M. & St. P. R. Co.*, 41 Iowa, 297, it seems to have been assumed that it creates an absolute liability; but the only point decided was that the act is not unconstitutional. It is, of course, not unconstitutional if construed as the defendant contends for. The question as to whether it is susceptible of such construction is now presented for the first time.

The first clause of the provision might seem to create an absolute liability. It makes the company liable for all fires caused by the operating of its road. If this provision stood alone it would go far in support of the plaintiff's construction,

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although it would not necessarily sustain it, as we will hereafter endeavor to show. But the provision is coupled with another providing for the manner of recovery, and this latter provision seems entirely superfluous, if an absolute liability is created by what precedes it. The party injured must, in any case, show an injury by escape of sparks or fire from the road. If the question of negligence is excluded no other issue is tendered, and no other question can arise; the manner and the only manner of recovery would be by showing the single fact necessary in the very nature of the case. Now, if this is all, it seems incredible that the manner of recovery should be deemed to call for a specific provision.

But, in our opinion, this is not all. The provision is that a person may recover for injury by fire in the same manner as for injury to stock. The manner of recovering for injury to stock is by showing the injury by the company, and that it occurred by reason of a want of a fence. This makes a *prima facie* case of negligence, and the burden is devolved upon the company to show itself free from negligence. This it may do, but in order to do it it must show a freedom from negligence in the matter of a fence. If it were negligent in that, it would be liable without negligence in other respects. But there must be negligence somewhere to make the company liable. *Aylesworth v. The C., R. I. & P. R. Co.*, 30 Iowa, 459; *Perry v. The D. S. W. R. Co.*, 36 Iowa, 102; *McCormick v. The C., R. I. & P. R. Co.*, 41 Iowa, 195. This is the essential fact in the determination of this case.

It is contended, however, that it is not proper to say that the company may be guilty of negligence in not fencing, because the duty of fencing is not imposed upon the company by law. It is true that the company may omit to fence, and properly too, if it prefers to pay for all injuries to stock for which it is made liable by reason of a want of a fence. But where there is an omission to fence, and an injury occurs for which the company is made liable by reason of the omis-

sion, it is scarcely ingenuous to say that the omission is not negligence.

If we are correct in the foregoing, then the manner of recovering for injury to stock, to which reference is made, pertains simply to the mode and measure of proof necessary to show a *prima facie* liability for such injury, and it follows that the design is to provide what is necessary to show a *prima facie* liability for fires.

In this connection it is important to observe that the liability for injury to stock occurring by reason of a want of a fence should, according to the strict letter of the statute, be absolute. But this court has held otherwise in the cases above cited. The letter has been made to yield to what is deemed the spirit of the statute, as not precluding the company from escaping liability if it can show that it was without fault. In construing that part of the same section which provides for liability for fires, we must recognize the same principle.

Indeed, in the latter case it is hardly necessary, as in the former, to override the letter of the statute. The language is: "The company shall be liable for all damages by fire that is set out or caused by the operating of its railway." To hold that an absolute liability has been created by the statute we must take the word *caused* to include its use in the remotest possible sense. If a locomotive is overturned by a tornado, and the fire scattered abroad from which fires are set out, the fires, it is true, may be said to be caused by the operating of the road, but only in the sense that they would not otherwise have occurred. Sparks escaping from an ordinary chimney, used in the ordinary way, might be carried by a strong wind to a building in the neighborhood, and if they lodged in material sufficiently combustible a fire might be set out. In such case the fire might be said to be caused by the operating of the chimney, but only in the same remote sense.

Where the person using the chimney was without fault, we should say ordinarily that the fire was caused simply by the

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wind and sparks. If, in the ordinary use of a locomotive, sparks escape without any fault on the part of the company, and are carried by the wind to combustible material outside of the company's right of way, and a fire is set out from them, the setting out of the fire is not caused by the operating of the road in any different sense from that in the case of the chimney. It is true the operating of the road is more dangerous, but it is not less legitimate; and this is the essential fact so far as this question is concerned. Railroads are not only expressly sanctioned by law, but they have become an important factor in modern civilization. The whole business of the country has crystallized about them. When railroad companies, under the law, have taken and paid for their right of way, they have the same right to use it that any person has to use his property. If in the legitimate use an injury occurs, without any fault in the mode of use, and simply by the intervention of an uncontrollable element of nature, we are to refer the cause to the element and not to the use.

But it is said that where a person for pecuniary profit pursues a business that is necessarily dangerous to others, he may properly be required to indemnify against the danger, or pay for the injuries which occur.

The principle thus broadly stated has never been recognized. The proximity of a planing-mill is more dangerous than that of a railroad. The ordinary life of such property, as estimated by insurers, is but about ten years. Many pursuits, not dangerous, are obnoxious, wherein the same principle applies. The rule is that if the pursuit is not a nuisance, in view of its character or time and place in which it is carried on, and there is no lack of care or skill, persons suffering therefrom are without remedy. It is possible that the rule may work a hardship in some of its applications; but in case of exposure to fire by railroads no hardship exists where the land-owner is compensated for the exposure.

Where compensation is made the parties may be considered as contracting upon good consideration that the risk shall

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be carried by the land-owner and not the company, and in such case it may well be doubted whether it would be competent for the Legislature to contravene the contract by providing that the risk should be carried by the company and not the land-owner. We come, then, to a material inquiry as to whether the compensation is embraced in right-of-way damages. That it is, we think the law is well settled.

The exposure which exists in the absence of negligence results necessarily from the operating of the road. It is a necessary element of depreciation. It is true the exposure is rather a consequential than direct injury, but it is not the less to be estimated and paid for by reason of such fact. In *Evansville & Crawfordsville R. Co. v. Dick*, 9 Ind., 433, the court said: "The Legislature cannot authorize either a direct or consequent injury to property without compensation." In *Sabin v. V. Cent. R. Co.*, 25 Vt., 363, the question arose as to whether the land-owner could recover for damages sustained by pieces of rock being thrown upon his land by blasting, in the construction of the road—the work being done with proper care and skill. It was held that he could not, because he must be presumed to have been paid when the right of way was taken. The court said: "The plaintiff had a right to claim, and was of course bound to present his claim, for all damages he was likely to sustain, not only in the running of the road by fires of engines and the like, but by the building of the road by the ordinary mode."

In *Rood v. N. Y. & Erie R. Co.*, 18 Barb., 80, an action was brought to recover for an injury by fire set out by the company to an adjacent wood. The plaintiff had sold and conveyed by deed a right of way to the company out of land of which the wood constituted a part. It was held that the plaintiff could not recover. The court said: "The grantor having conveyed a certain parcel of land for the purpose of a railroad out of a much larger parcel retained by him, the grant is subject to all the consequences necessarily

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attendant upon such a use of the same, and particularly such as would result from the running of engines and the consequent exposure of property on his adjacent land to such injury and loss as would naturally result therefrom."

In *Webber v. Eastern R. Co.*, 2 Met., 149, which was a proceeding for assessment of damages for right of way, it was held to be proper to show by an expert that the premium for insurance on a building standing upon the remaining part of the premises would be increased by the proximity of the road.

In *Snyder v. W. U. R. Co.*, 25 Wis., 60, which was also a proceeding for assessment of damages for right of way, witnesses called to estimate the damages were allowed to consider the exposure of the remaining part of the premises to fire.

In *Kucheman & Hinke v. The C., C. & D. R. Co.*, 46 Iowa, 366, the question rose directly as to whether consequential damages were allowable, as for diversion of trade. It was held that they were. The court said: "We are of the opinion that the damages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken." Exposure to fire, so far as it is unavoidable, most certainly results proximately from the use of the road. The exposure, then, is a part of the injury for which right-of-way damages are allowed, and it is presumed to be paid for when such damages are paid.

A provision by the Legislature that notwithstanding such payment the company, and not the land-owner, should sustain whatever loss occurs, if not unconstitutional, would be manifestly unjust; and we are not to put a construction upon a statute which would manifestly effectuate injustice if it is susceptible of a different construction.

It may be that the land on which the plaintiff's elevator was erected was not part of a tract from which the right of way was taken. If so, it cannot be said that the owner of that land was compensated for the exposure under considera-

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tion. But that would not materially affect the argument. The language of the statute is general, and must have a general operation. If the railroad company is made insurer against any risk of this nature, it is made, according to the terms of the statute, insurer against all risks of the same nature, including those for which it has paid the land-owner in advance.

Where a statute is of doubtful construction it is proper to give some weight to what might be considered as demanded or forbidden by the public interest. This consideration, so far as it is entitled to any influence in this case, is unfavorable to the construction contended for by the plaintiff. The statute, as construed by him, is designed to afford an indemnity against carelessness as well as pure accidents. Railroad companies cannot control the erection of buildings or the accumulation of combustibles outside of the one hundred feet held for right of way. Cities grow up upon a railroad and because of it, built, in the absence of ordinances, precisely as the owner of each building sees fit to build it. Under the ruling in *M. & St. P. R. Co. v. Kellogg*, 4 Otto, 469, and under the construction of the statute in question contended for by the plaintiff, a railroad company may be held liable for the destruction of a whole city, occurring without the company's fault. It may be held where such accident would not have occurred but for the improper construction of buildings or the want of suitable means for extinguishing fires. Insurance companies require that the insured shall carry a part of the risk. Long experience has shown this to be necessary. But it is scarcely more necessary for the protection of insurance companies than the public. The statute in question, under the construction contended for by the plaintiff, is designed to afford complete indemnity, and it would prove such, perhaps, in small fires, but probably not in large ones.

It is urged that the statute, construed as the plaintiff contends for, would have the effect to secure a higher degree of care on the part of railroad companies; but this is

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not so. There is no higher degree of care than faultlessness. For negligence railroad companies are liable without the statute. The only effect, so far as their action is concerned, of imposing upon them the liability in question would be to compel them to increase their charges. It would only make railroads more expensive things to own and operate, and more expensive means of transportation and travel. The burden would fall upon the community at large. The cost of railroads even now consists in part of the right-of-way damages, which, as we have seen, include compensation for the exposure created by them. This, like any other element of cost, enhances their expensiveness as means of transportation and travel. Why in addition to this, and as a part of the expense of operating them, the patrons should be burdened with paying for burned elevators erected by their owners within what they knew, or should have known, was dangerous proximity to the road, or for burned stacks of hay and grain which could have been protected by plowing a few furrows of ground, we are unable to see.

We are aware that there has been a conflict in the decisions upon the question whether at common law, in case where property has been destroyed by fire set out by a railroad company through its fault, the company could escape liability upon the ground that the owner of the property contributed, by his own negligence, to the loss. It does not come within our purpose to collate and compare the decisions. It is sufficient to say that it is the doctrine of this court that contributory negligence will defeat a recovery in such case. *Kesee v. The Chicago & N. W. R. Co.*, 30 Iowa, 78. In that case it was held that the plaintiff could not recover for stacks of grain burned if he was guilty of negligence in not plowing around them, notwithstanding the company might have been negligent. The decision does not appear to have been controlled by what was regarded as the weight of authority. That, indeed, could hardly have been claimed. It is based, apparently, upon what the court deemed to be natural justice. Now if it

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is right upon principle that contributory negligence should defeat a recovery where the company is in fault, it is an outrage that contributory negligence should not defeat a recovery where the company is not in fault. Yet it would not if the statute creates an absolute liability.

Stacks of grain are built in close proximity to a railroad at a dry season of the year. They are surrounded by dead grass, stubble, and other combustible material. The railroad company, we will suppose, cannot wholly prevent the escape of sparks. Safety to the stacks is to be secured by removing them or plowing around them; yet the company can do neither. It has no reliance but the prudence of the owner; and yet the statute, if construed as contended for, has deprived him of all motive to be prudent by making the company his insurer to the full value of the stacks. This does not prove, of course, that the Legislature has not perpetrated the outrage in question, but the language used is not such as to induce us to believe it has.

An attempt has been made to evade the necessity of construing the statute by saying that, as a matter of fact, the escape of sparks can be prevented, notwithstanding the testimony to the contrary. Something is urged upon our attention in regard to the possibilities of science. Cases are cited wherein it appears that judges have indulged in this most uncertain of human speculations. We refrain from so doing. We regard it as sufficient if railroad companies employ the best known means and methods. What lies beyond the known it is not the province of courts or juries to consider.

In supposing that the case called for a construction of the statute we think the court below was right, but in construing it as creating an absolute liability, without regard to the negligence of the company, we think the court erred.

REVERSED.

BECK, CH. J., *dissenting*.—I. I cannot assent to the foregoing opinion, and am authorized to say that Mr. Justice DAY

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concur in the conclusions and the arguments in their support which I shall now present.

The first opinion filed in this case sustained the judgment of the court below. I still adhere to it. Having prepared that opinion I may with propriety now use it as an expression of my views upon the questions discussed therein. I present here such parts of it as are applicable to the questions discussed in the foregoing opinion of the majority of this court, which are as follows :

II. The action is brought under Code, § 1289, which is in these words :

“Any corporation operating a railway that fails to fence the same against live stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, for the value of the property or damage caused, unless the same was caused by the wilful act of the owner or his agent; and in order to recover it shall only be necessary for the owner to prove the injury or destruction of the property; and if such corporation neglect to pay the value of or damages done to any such stock, within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served upon any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed, or damages caused thereto; *provided*, * * *.

“The operating a train upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence, and render the company liable under this section.

“*And provided further*, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may

be recovered by the party damaged in the same manner as set forth in the section in regard to stock, except double damages."

The court gave to the jury an instruction in the following language:

"2. It is provided by statute in this State that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. And the question arises in this case whether the defendant is liable, unless it be shown that the fire was caused by the negligence of the defendant or its employes, or whether the liability is an absolute one regardless of the question of negligence. It is, in my opinion, and I instruct you that under this statute, if it be shown by the evidence that the fire was caused by defendant in operating its railway, it is absolutely liable for the damages caused thereby, whether the defendant was or was not guilty of negligence."

An instruction to the effect that plaintiff is not entitled to recover, unless it be shown that the fire was set out through defendant's negligence, was asked by defendant and refused. The giving of the one and the refusal of the other instruction is now complained of by defendant.

Counsel of defendant insist that, in a case of this character, no recovery can be had except upon proof of negligence on the part of defendant. They base their position upon the argument that, under the section quoted, a railroad company is liable for the destruction of stock because of its negligence in failing to fence its track; that the absence of a fence, *per se*, constitutes negligence, and, therefore, in the case of fire there can be no recovery against the corporation unless some act of negligence is proved or may be inferred. Negligence, they insist, under the first proviso of the act, is the ground of recovery. They conclude, therefore, that as the cases contemplated in the part of the section relating to the destruction of stock depend upon negligence, those contemplated in the last proviso must be based upon the same ingredient; for

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damages in the last-named cases are recoverable, by the very language of the section, in the same manner as in the first.

There are two answers to the argument, the first admitting its premise to be true, namely: The existence of negligence is a necessary ingredient of a cause of action for the recovery for stock injured upon the road of the corporation. The argument assumes that negligence for killing stock at points where the corporation had a right to fence, other than depot grounds, consist in the failure to fence. The absence of a fence permits cattle to go upon the road; the negligence is in such permission. It will be observed that the negligence consists in permitting that which the railroad company could prevent. The negligence at the depot grounds in the same manner consists in permitting a rate of speed which the company could prevent.

The same character of negligence is found in the act of permitting fire to escape. The corporation could prevent it; injury results from its escape. The law, therefore, holds it to be negligence. But it may be said that the fire might escape through accident. True, but this does not excuse the company any more than the running of the train through oversight, mistake or accident, at a greater rate than eight miles an hour, would excuse the killing of cattle on the depot grounds, or the failure to build a fence through accident, as the accidental burning of the lumber before the fence was erected, or the like, would excuse the want of a fence. The negligence in each of these cases, as contemplated by the statute, consists of acts of permission: the permission of stock to run on the track, whereby it is destroyed; the permission of a prohibited speed, whereby animals are injured; the permission of fire to escape, whereby property is consumed. The acts are of the same character. But it may be said, as fire must be used in running the engine, the railroad company cannot dispense with it, and whenever used it is liable to escape through accident, and cannot be certainly controlled. But this conclusion we cannot admit. We are of opinion

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that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use we know not, and it is not important to inquire; that they may be applied cannot be doubted, when we contemplate the resources which science brings to the use of machinists. At all events, the law, in holding railroad companies liable for damage resulting from fires set out by the engines, presumes they may prevent injuries resulting in that way.

But the more satisfactory answer to the argument under consideration is by the denial of the premise upon which it is based, namely, that the right of action for stock injured depends upon the negligence of the railroad corporations. The law does not require fences to be built, and does not forbid a rate of speed greater than eight miles an hour upon depot grounds. It simply creates a liability for cattle injured when no fences are erected, and the speed is beyond that named. There is no violation of law in failure to erect fences, or in running at a greater speed than is named. The rights of no one are invaded thereby, and the companies exercise an undoubted right in refusing to fence, or in running their trains at a speed exceeding eight miles an hour. Surely, when an act is done which the law does not forbid, which is in conflict with the rights of no one, and is done in the exercise of a right, it cannot be said to be neglect. This court has held that liability of a railway corporation for stock killed at a place where the right to fence existed, and the road was not fenced, exists without regard to the question of negligence. *Spence v. The C. & N. W. R. Co.*, 25 Iowa, 139; *Stewart v. The B. & M. R. Co.*, 32 Iowa, 561.

Let us notice carefully the language of the statute, and consider the liability created and the remedy provided.

1. As to liability. A railroad corporation is liable for stock killed at points upon its road when the right to fence exists and no fence is erected. The liability exists in spec-

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ified cases; these are, when no fence has been built, and the right to fence exists. The law applies to no other.

2. As to remedy. In order to recover it shall only be necessary for the owner to prove the injury or destruction of his property. Negligence need not be shown.

In the cases contemplated by the statute, as above specified, and in no other, the remedy is applied. Now, it is very plain that the condition of fences and the right to fence have no reference to care or negligence; they are introduced solely as conditions upon which the cases rest. When these conditions are filled liability of the railroad company attaches.

The last clause of the section cited imposes liability upon railroad companies for damages resulting from fire caused by the operating of their roads. There is no condition accompanying the act of setting out fire necessary in order to create liability. It is absolute, without conditions, and depends upon no fact or circumstance other than the fire. No idea of negligence enters into the clause. It is provided that damage may be recovered in the same manner as provided for the recovery in the case of stock killed. This provision does not relate to the liability, but to the remedy. Whatever pertains to the remedy in the preceding part of the section is here referred to, and nothing else. It will, therefore, be readily seen that no idea of negligence enters into the provision creating liability on account of fire. No such idea is in the preceding part of the section, and the reference to the context in the clause under consideration, of course, can convey no thought of negligence. But even if the conditions of fences and the right to fence, in that part of the section creating liability for stock killed, convey the idea of negligence (which we have demonstrated does not exist), the thought of negligence cannot be found in the last clause creating liability for fire, for the plain reason that there are no conditions whatever upon which such liability is made to depend. It is absolute without conditions. The language referring to the manner of recovery, as

we have seen, expresses no condition attached to the liability, but relates to the remedy.

Counsel for defendant cite *De France v. Spencer*, 2 G. Greene, 462, which holds that a statute making a party liable in a civil action for injuries sustained from fire set out by him and permitted to escape, cannot be enforced against him unless he willingly or carelessly permitted the escape of fire. It is insisted that the doctrine of this decision is applicable to the case before us. The statute differs from the one before us in the particular that it is penal, subjecting the party to a fine. Upon information and upon conviction in the criminal proceeding his liability to the party injured accrued. As he could not be convicted unless the act was knowingly and intentionally committed, his civil liability would arise only upon the same conditions. Upon this view the opinion, so far as it holds that the act must be *willingly* or *carelessly* done, may be supported. But a similar statute was by this court held to impose liability without regard to negligence, under a legislative intention discovered by comparing the statute with another in *pari materia*. *Conn v. May*, 36 Iowa, 241. We need not inquire whether these cases are in conflict. We think that as they construe penal statutes they are not applicable to the case before us, which involves the construction of a statute intended to secure a civil right and its enforcement by action.

III. It is insisted that the fire might be set out from an engine of a railroad company by inevitable accident or the act of God. In such a case, it is claimed, the corporation would not be liable. It is neither necessary nor proper to enter into inquiries suggested by this position. No such question is presented in the record, either by the pleadings or evidence before us. It is not claimed, even in argument, that the fire was set out by inevitable accident. No such question was raised by request for instructions, and had an instruction been requested presenting this view of the law it would have been properly refused as being inapplicable to the testimony. The

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instruction given by the court, as above quoted, is not erroneous, even should it be held that inevitable accident would relieve the defendant of liability, for no such defense was raised, and no evidence in support of that theory was before the court.

IV. The fire was not communicated to the property destroyed directly by defendant's engine; it was communicated to another elevator and thence to plaintiff's property.

It is insisted that the injury suffered by plaintiff is the remote and consequential effect of the defendant's act, and no recovery can be had therefor.

The rule that damages must be the direct and proximate result of the act complained of, and not the remote and consequential effects, is not the subject of dispute in the profession. But the application of the rule is the subject of constant disagreement in the authorities; cases similar, in fact, with the one before us have been decided differently by the courts. It is impossible to reconcile the books upon this point, and arguments based upon reason could hardly be presented that would meet with general approbation. In our opinion the injury sustained by plaintiff is within the limits of proximate and direct results of the act of defendant for which he may recover. *The Milwaukee & St. Paul R. Co. v. Timothy Kellogg*, 94 U. S. (4 Otto), 469; *Fent v. T., P. & W. Ry. Co.*, 59 Ill., 349; *Kellogg v. The C. & N. W. Ry. Co.*, 26 Wis., 223; *Perley v. Eastern R. Co.*, 98 Mass., 414. See Field on Damages, §§ 50, 664, and notes, for a collection of authorities upon this point.

V. The defendant's counsel next maintain that the statute under which plaintiff's action is brought is unconstitutional. The question thus raised was carefully considered by this court, and the statute was sustained by a unanimous opinion in *Rodemacher v. The Milwaukee & St. Paul Ry. Co.*, 41 Iowa, 297. The arguments upon which that decision was based are quite satisfactory and need not be repeated.

VI. An argument against the law is based upon the pos-

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sible consequences that might result in the case of a fire communicated by a railroad engine consuming such great amount of property that the company, by the enforcement of the law, would lose all its property. The statute, it is said, would thus be the means of the destruction of the corporation under a power to be exercised only for its regulation. It would, therefore, it is claimed, destroy vested rights.

The argument is based upon a case of supposed hardship. We may admit the possibility that such case may arise, but it is no ground for holding the act void. The courts would fail utterly in the administration of justice if they were to enforce only such rules that, in no conceivable case, will work hardship. In truth, hardships in the administration of justice are constantly occurring. "Hard cases make bad law," is a familiar legal proverb. But "hard cases" never make "bad law" except when judges modify fixed and established rules to suit the cases, or adopt new rules intended to mitigate their hardships. It is bad enough for "bad law" to be made for real "hard cases;" it would be much worse for judges to anticipate possible hard cases and suit their rulings thereto, rather than adapt them to the rights and obligations of the parties in the cases before the courts.

The question to be determined in passing upon the validity of the statute is this: Is it within the scope of the constitutional power of the State? If so, the power assumed by the law may be exercised without regard to future consequences, even though they might be what counsel call the destruction of the property of a railroad corporation. The State has the right to levy taxes for the protection of the rights of the property, and its own existence. It may, if necessary, be exercised to the extent of condemning and appropriating, by taxation, all the property in the State. Shall we hesitate to enforce the power to tax, on the ground of the disastrous consequences of the exercise of the power to its full extent, which, possibly, at some future day, may be felt by the people?

The argument of counsel, in our opinion, is *not* based upon

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proper views of the power of the State, and of the necessity of individuals and corporations submitting their property to the operation of laws intended for the public good, even though cases possibly may arise whereby, under the law, they would be deprived of their property.

VI. Having above produced the opinion of this court first filed in this case, I will now present other views in support of the construction of Code, § 1289, adopted in the foregoing opinion, which, I think, answer the arguments advanced in the opinion of the majority of this court. It is claimed in that opinion that recovery for stock killed is based upon negligence of the railroad corporation in not erecting a fence. This court has held that liability in such cases attaches regardless of the question of negligence. *Spence v. The C. & N. W. R. Co.*, 25 Iowa, 139; *Stewart v. The B. & M. R. R. Co.*, 32 Iowa, 561. The negligence referred to in these cases is the omission to build fences; or, more properly speaking, it is held that no negligence is imputed for the failure to erect fences. The railroad company, then, is not, in law, negligent in failing to fence its track. In the absence of fences its liability is absolute, and is established by evidence of injury to or destruction of stock.

While the law does not hold the railroad company negligent in not erecting fences, it may raise the presumption of negligence in running the train which causes the injury. The railroad being open to stock the law requires the train to be so operated that no stock will be injured thereby. If injury does result the law will presume that the train was not operated with the care required by law, namely, so that stock upon the road will not be injured. Now, in case stock is injured, the law raises a presumption of negligence—not in failing to fence the road, but in running the train so that injury results. It seems to me that this conclusion cannot be denied. It is supported by the very reason and spirit of the statute, which intends to preserve from injury stock running at large, which the statute is enacted to protect. It says to

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the railroad corporation: "You may use your road without fencing it, but when you do so your trains must be so operated that no injury results to stock. If your road is unfenced your liability is absolute; you were negligent in failing to discharge the duty the law imposes upon you to run your trains without injury to stock, and you are therefore liable."

To recover for stock injured the plaintiff is required to prove the injury and nothing more. It is true that the plaintiff is required to allege and show that the right to fence existed at the place of the injury, and that no fence was constructed. But this evidence is not for the purpose of establishing negligence in failing to fence the road, but to show that the statute is applicable to the case. It will be remembered that the statute is applicable only to cases where the road, at the place of the injury, is not fenced, and the right exists to fence there. The evidence does not show negligence in omitting to fence, but brings the defendant within the operation of the statute. I think these positions cannot be successfully denied.

I may concede that the language of the last paragraph of section 1289, providing that damage for fires may be recovered "in the same manner" as for injuries to stock, relates to the evidence to be introduced, as is claimed in the majority opinion. In each case the plaintiff must introduce the preliminary proof showing that the defendant comes under the provisions of the statute. In each case the preliminary proof is alike, so far as to show that the defendant is a corporation operating a railroad. In the case of injury to stock the right to fence and the absence of a fence must be further shown. In each case, after it is shown that the statute is applicable to the defendant, the proof of injury establishes the liability. Recovery, therefore, may be said to be had in each case in the same "manner." And it may be further remarked, that negligence of the corporation, in the case of fire, is presumed in the same manner that negligence in running the train is inferred in case of injury to stock.

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The statute, for the protection of property adjacent to the railroad, says to the corporation, you may use the dangerous element of fire in operating your trains, but must so use it that no injury results therefrom. If injury does result you will be presumed to have been negligent. In this respect recovery is had against the corporation in the same manner as in cases of injury to stock.

VII. *Aylesworth v. The C., R. I. & P. R. Co.*, 30 Iowa, 459; *Perry v. The D. S. W. R. Co.*, 36 Iowa, 102, and *McCormick v. The C., R. I. & P. R. Co.*, 41 Iowa, 195, are cited by the majority of the court in the support of their position that recovery is had for injury to stock because of negligence in not building fences. These cases, I think, do not support that position. They hold that, where fences have been erected, the corporation is not liable for injury to stock if due care is exercised in maintaining the fences, and in keeping them in proper repair. It is very plain that the liability of the company in such a case is based upon different grounds than it is when its railroad has never been fenced.

VIII. In my judgment the opinion of my brothers contains many loose and inaccurate expressions as to the cause of the injury where stock is destroyed upon an unfenced railroad. It is said that in such a case the manner of recovering is by showing the injury "occurred by reason of a want of fence." It is very plain that the absence of a fence cannot be regarded as a cause of the injury. The fence is intended to prevent the injury. Who ever heard the non-existence of a preventive alleged as the cause of an injury? I am assaulted and fail to exercise resistance in the defense of my person; is my non-resistance the cause of my injury? It certainly cannot be claimed in law that the want of precautionary contrivances to prevent an act is its cause. I think such a position would not even be good in metaphysics. It is certainly bad in law.

IX. In another part of the opinion an attempt is made to establish the proposition that we must search for a fault or

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negligent act in order to find the *cause* of the injury in the case of fires set out by locomotives. If this position be sound, which for the purpose of the case I may here admit, we find the fault, as I have above shown, in the negligence presumed by the law when fires occur from passing trains.

But I confess to little satisfaction in these speculative, metaphysical inquiries into causation. All I care to know is this: The statute declares that the railroad company shall be liable for property burned by fires set out by its engines. I do not see that the corporation could be relieved of liability if we should conclude that the wind had a hand in the work of destruction. I have so little respect for metaphysics that I am very sure it could never satisfy my mind that in such a case the fire was not "set out or caused" by the engine operated upon the road. The simple facts remain that fire was used in operating the engine; that it did escape and burn the property. I care nothing about the agencies which spread the fire. Its source and origin was the engine which set it out and caused the destruction. In just such a case the law declares that the corporation is liable, and right here discussion ought to end.

X. An argument of the majority opinion is based upon the importance and public character of railroads. They are, it is true, constructed and operated for public purposes. This court holds that the people may be taxed to aid in their construction. The Legislature may control their operation. If, in the operation of these public agents, the property of the citizen is destroyed, the law ought to provide for compensation. This is in accord with justice and the spirit of our constitution. Such compensation ought to be rendered by the public agent, the railroad company, destroying the property. To provide for such an eminently just and constitutional remedy the statute in question was enacted.

Common carriers have always been charged by the common law with liability for all losses of goods transported by them, except such as may be caused by the act of God or the public

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enemies. They become insurers of the goods they carry. This rule is based upon public policy and the public nature of the employment of carriers. I have never heard complaint of it. So favored is it by the law that it cannot be waived by express contract. As the law makes carriers insurers of the subjects of transportation, why may it not impose the same obligation as to other property exposed to peril by the means used in the prosecution of their public employment? I know of no reason why it may not.

XI. In another part of the opinion of my brothers it is, in effect, admitted that railroad companies do insure against risk of fires set out by their trains, and render compensation in advance by payments made for the right of way for their roads. If the companies do, in this way, pay for such risks, as is claimed by the majority, their arguments against liability, it seems to me, are overthrown by the admission. It is surely competent for the Legislature to so provide that the railroad companies shall render compensation for actual losses by fire set out by their engines, rather than pay for the risk of such losses. Their liability for such risk being admitted, it cannot be denied that legislation may substitute therefor liability for the actual loss.

But this court has decided that the future risk of fire from trains cannot be considered an element of damages for which the land-owner may claim compensation upon condemnation of the right of way. Such risk to buildings and property which may be put upon the land after the construction of the railroad is not to be considered in estimating damages. *Fleming v. The C., D. & M. R. Co.*, 34 Iowa, 353. The doctrine announced in the majority opinion seems to me to be in direct conflict with this decision.

XII. It is insisted by my brothers that the doctrine I contend for would impose the necessity upon railroad corporations of increasing their charges in order to enable them to pay the damages that would be assessed for losses by fire, and that the burden would thus be made to fall upon the

community at large. If this position be admitted, I am unable to discover that it presents an objection to the construction of the statute for which I contend. I think that if the public wants or convenience demand that the property of the citizen be put at hazard, the public ought to render him compensation if it be destroyed. But I think this objection is purely imaginary. The statute in question was enacted more than five years ago. The interpretation I contend for has, I think, been regarded as correct by the profession and the *nisi prius* courts. I may certainly say that the contrary interpretation has not had the approval of the professional mind of the State. But during this period I have never heard it intimated that the charges imposed by railroad companies have been in the least degree affected by the existence of the statute.

XIII. It is also insisted by the majority of the court that the construction of the statute for which I contend would render a railroad company liable in case the owner of the property burned contributed to its destruction by his own negligence. This is denounced by my brothers as an outrage. I am not required to examine the correctness of the proposition, for I am very clear that the question is not in the case. Indeed, I do not understand that it is so claimed; but the doctrine condemned is announced for the purpose of bringing discredit upon the construction of the statute contrary to the views of the majority. It is a manner of argument hardly admissible in judicial decisions, and is the prolific mother of *dicta* which have given courts and the profession so much trouble. When a case involving this question comes before the court it will be the time to consider it, and until then it cannot be decided.

XIV. The construction adopted by the majority of the court takes all the life out of the statute. It is, in effect, that railroad corporations are relieved of liability under the enactment, when absence of negligence is shown. They were

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so relieved of liability before and without the statute. Its enactment was, therefore, vain.

XV. But it is said that, under this construction of the statute, want of negligence may be shown as a defense; that, by the statute, the burden of proof as to negligence is changed. A brief consideration of this position will, I think, show that it is not supported by reason and legal principles.

The rule of law relating to the rights of the parties, as laid down in the majority opinion, is this: A person whose property is burned by fire, communicated by a railroad train, may recover if it was set out through negligence of the employes operating the train. Let the rule be stated briefly in other words: Plaintiff may recover if defendant set out the fire, and defendant was, in the act, negligent. Two things, it will be seen, must exist to fix defendant's liability: *First*, setting out the fire; *second*, negligence. One of these things is just as essential as the other to support the right of plaintiff to recover. So far we have stated the rights of the parties. We will now inquire as to the remedy under the view just stated that the statute changes the burden of proof.

In an action to enforce the liability the *onus* rests upon plaintiff to show the setting out the fire. Here he may rest, of course. If defendant introduces no evidence may plaintiff recover? The theory we are now considering requires the double answer, no and yes—no, for the right to recover rests upon negligence, and that has not been shown; yes, for the burden of showing absence of negligence rests upon defendant, which he has not established.

The rules of the law require a plaintiff to establish his right to recover, and the *onus* rests upon him to show every fact necessary to support that right. In the case before us, as it is regarded by my brothers, the absence of negligence would not be a defense, for the existence of negligence is a necessary ingredient to create a right to recover, and must be shown to establish such right. The defendant, then, is not required to prove a negative, and to show the non-existence

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of a necessary fact supporting plaintiff's right to recover. No such course of pleading and practice has ever prevailed in courts under the common law. Yet such a rule of pleading is the necessary consequence of the construction of the statute in question which I am resisting. It cannot be possible that the Legislature intended to establish a practice and course of proceeding so utterly in conflict with the principles of our jurisprudence, so destitute of support from reason, and never before heard of in this land.

If the Legislature intended simply to change the burden of proof, as is claimed by my brothers, surely language would have been employed which would have expressed that intention with reasonable clearness and certainty, and not the language of the statute in question, from which such intention can be gathered, if at all, by strained construction based upon speculation and abstruse reasoning.

WALKER V. HUTCHINSON ET UX.

1. **Practice : SETTING ASIDE DEFAULT.** The action of the court below, in refusing to grant a default for want of an answer, will not be interfered with unless an abuse of discretion be shown.

Appeal from Johnson Circuit Court.

THURSDAY, MARCH 20.

THE petition in this cause was filed on the 10th day of January, 1876. The action is in equity, and involves the validity of a tax title. Defendants appeared and filed a motion in said cause on the 22d day of March, 1876. On the 22d day of March, 1877, the court made the following order :

"On motion of plaintiff it is ordered that this cause be continued, and that defendants have judgment for costs up to date, and defendants are ruled to answer within sixty days."

50	364
119	57
50	364
127	114

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On the 26th day of May, 1877, the defendants having failed to answer, the plaintiff filed a motion for a default for want of an answer.

On the 24th day of September, 1877, before the commencement of the next term of said court, but on the day appointed for the commencement of the next term, the defendants filed the following affidavit:

"I, George J. Boal, having been duly sworn, say that after the last term of this court the plaintiff, by his agent and father, entered into such negotiations with this defendant, R. Hutchinson, as made a settlement of the suit pending more than probable, and answer in this cause wholly unnecessary; and defendant was requested, before making any further or any defence in said cause, to visit plaintiff and his father in Chicago and ascertain if a settlement of the controversy could not be effected without litigation; that this visit and attempted settlement at plaintiff's request postponed the answer until after rule day, and but for this answer would have been filed then."

At the same time the defendants presented an answer to plaintiff's petition. Thereupon the plaintiff filed certain affidavits controverting the affidavit of Boal.

Afterward the court overruled the motion of plaintiff for a default, the answer of defendants was filed, and the court on its own motion referred the cause to Hon. W. J. Haddock, to be tried in vacation. Plaintiff appeals.

Edmonds & Younkin, for appellant.

Boal & Jackson, for appellee.

ROTHROCK, J.—The plaintiff complains because his motion for a default was overruled, and the defendants were permitted to answer. It will be observed that no judgment by default had been entered. The cause stood upon plaintiff's motion for a default because the defendants

1. PRACTICE:
setting aside
default.

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had not answered within the sixty days. The question for our determination is, did the court abuse its discretion in holding that the resistance to the motion was sufficient to entitle the defendants to answer?

It has often been determined that setting aside a judgment obtained by default is a matter within the legal discretion of the court, and that this discretion should not be interfered with upon appeal excepting in cases where it clearly appears that it has been improperly exercised. This being the rule where a default has been allowed or entered, it should apply in all its force to a ruling upon a motion for a default.

An examination of the whole record in this case satisfies us that there is no good ground for a reversal of the ruling of the court below. It is true the affidavit in excuse of the failure to plead is controverted in some of its fact statements by the counter-affidavits, but we are not called upon to settle such conflict. We must accept the finding of the court below as correct upon the facts, the same as in any other case of conflict of evidence. There are many considerations in this record leading to the conclusion that the default was properly refused. Among these are the following: The character of the action was such as to lead to the conclusion that the defendants really desired to contest the claim made in the petition. The order continuing the cause was made at plaintiff's instance, and at his costs, thus showing that up to the time the rule to answer was entered the defendants had not been negligent in defending the action. It does not appear that any delay was occasioned by permitting the defendants to answer, because if they had answered within the rules the court could not have made the order of reference before the term at which it was made.

It is urged that the motion of the plaintiff should have been sustained because there was no affidavit of merits filed by defendants. Section 2871 of the Code, upon which plaintiff relies, provides that a default shall not be set aside

The Wilson Sewing Machine Co. v. Sloan.

unless an affidavit of merits be filed, and a reasonable excuse shown for having made the default. But this was not an application to set aside a default. It was an application asking that a default be entered against the defendants, which they resisted by an affidavit in excuse, and by an answer exhibited with the affidavit.

We are the more ready to affirm the ruling of the court below because the parties are thus enabled to try the cause upon its merits—a right which all courts should endeavor to preserve, when it can be done without prejudice to any one, and without the violation of well-established rules.

AFFIRMED.

THE WILSON SEWING MACHINE CO. V. SLOAN ET UX.

50 367
117 140

1. **Evidence : LETTERS: PRINCIPAL AND AGENT.** Letters written by an agent to a party between whom and his principal a contract exists with reference to the subject-matter thereof, and within the scope of his authority, are competent against the principal.
2. **—— : WRITTEN CONTRACT: FRAUD.** A letter or other writing is not admissible to vary or enlarge a written contract between the parties; but it may be admissible for the purpose of showing that fraudulent representations were made as an inducement to the contract.
3. **Damages: MEASURE OF: BREACH OF CONTRACT.** The measure of damages for a breach of contract for the exclusive sale of an article of merchandise is the value of the agent's time during the period he was employed under the contract, with reasonable expenses added, and diminished by the sum actually earned.

Appeal from Howard Circuit Court.

THURSDAY, MARCH 20.

THE petition alleges, in substance, that on the 7th day of March, 1873, plaintiff entered into a written agreement with the defendant E. B. Sloan, whereby the defendant E. B. Sloan was to exclusively sell the Wilson sewing machine in the town

The Wilson Sewing Machine Co. v. Sloan.

of Cresco and vicinity, and to pay the plaintiff thereon thirty-three and one-third per cent from the established retail price of the machines to be fixed by the president or board of directors of plaintiff; that to secure the plaintiff for all indebtedness, of whatever form, which might accrue under the agreement, the defendants, E. B. Sloan and Mary, his wife, executed their bond to plaintiff in the penal sum of one thousand dollars; that, in settlement for machines and attachments furnished, the defendant E. B. Sloan, on July 1, 1875, executed to plaintiff his promissory note for two hundred and forty-five dollars, due in six months, and also delivered and assigned to plaintiff four notes of purchasers of machines, amounting to the sum of one hundred and forty-five dollars and interest; that plaintiff has sued and recovered judgment upon these last notes, but that no part of them has been paid. Plaintiff offers to assign these judgments to defendants, and prays judgment against them for four hundred and thirty-nine dollars and thirty-eight cents, and forty-five dollars attorney's fees.

The defendants, for answer, admit the making of the contract referred to in the petition, and allege that by oversight and mistake the written agreement expressed that defendant E. B. Sloan was to exclusively sell the Wilson sewing machines in the town of Cresco, Iowa, when it was intended that defendant should have the exclusive sale of said machines throughout the county of Howard, Iowa; that plaintiff's attention was called to this fact, and plaintiff then informed defendant that it had noted on said contract, and on plaintiff's territory record book, that all of Howard county was controlled by defendant; that afterward plaintiff agreed with defendant that he should have Chickasaw and Mitchell counties; that in violation of its agreement plaintiff sold and agreed to sell to the Patrons of Husbandry, a society having many granges in Howard, Mitchell and Chickasaw counties, a large number of said machines, for a much lower price than defendant was permitted to sell, whereby many sales that defendant might

The Wilson Sewing Machine Co. v. Sloan.

have made were interfered with and prevented, and his business was ruined, to his damage in the sum of one thousand six hundred dollars; that by reason of plaintiff's failure to make good its warranty of a machine sold by defendant he has been damaged in the further sum of one hundred and sixty dollars.

The defendants allege that the notes of third persons assigned to plaintiff might all have been collected by the exercise of proper diligence on the part of the plaintiff. The defendants ask judgment for one thousand six hundred dollars and costs.

The reply denies all the allegations of the defendants' answers, and alleges that they had knowledge of all the matters alleged at the time of the execution of the note sued on as a balance due on settlement.

There was a jury trial, and a verdict and judgment for defendant for six hundred and fifteen dollars and sixty-two cents. The plaintiff appeals.

H. T. Reed, for appellant.

H. C. McCartey, for appellees.

DAY, J.—I. Against the objection of plaintiff the defendants were permitted to offer in evidence certain letters, signed

1. EVIDENCE: "Wilson Sewing Machine Co. S." This action
 letters: princ-
 pal and agent. of the court is assigned as error. It is objected
 that it does not appear that the letters were written with the
 authority of the plaintiff. The defendant E. B. Sloan testi-
 fied that the letters were written by Sawyer, the plaintiff's
 general agent at Chicago, with whom he transacted his busi-
 ness, and that they are in response to letters written to plain-
 tiff. W. G. Wilson testifies that he has the general manage-
 ment, control and supervision of the company in the United
 States; that George Sawyer was the special agent of the
 company, located at Chicago, and conducted the correspond-
 ence with defendant in relation to his business transactions,

The Wilson Sewing Machine Co. v. Sloan.

partly through the dictation of witness. We think there was no error in admitting the letters written after the contract was executed.

II. One of the letters above referred to was written February 21, 1873, before the contract in question was executed.

2. ———: writ- It is as follows: "*E. B. Sloan, Cresco*: Your
ten contract: letter of the 18th received. We have received no
fraud. letter, or made any proposition to the society you speak of,
and do not intend to make any arrangement of the sort."

The defendants allege that E. B. Sloan, prior to entering into the agreement with plaintiff, expressly told plaintiff that if it had any arrangement to sell otherwise than through their local agents to the Patrons of Husbandry their said machines, or if they had sold or were selling to them, or going to sell to them, he would have nothing to do with their machines; that plaintiff then stated to defendant that it had not received nor made any proposition to the said society, and did not intend to make any arrangement with said Patrons of Husbandry; that at the time said representations were made by plaintiff it had sold and made arrangements to sell and furnish to said society or to its agents a large number of said machines, at greatly reduced prices, and was permitting them to be shipped into and sold in defendants' said territory by the persons to whom plaintiff sold, and by plaintiff itself, and that these statements and representations were fraudulently made, for the purpose of inducing the defendants to enter into said agreement and the employment of the plaintiff thereunder. The written contract entered into between the parties gives the defendants the exclusive right of selling plaintiff's machines in Cresco, or at the most in Howard county. This letter is not admissible for the purpose of establishing an agreement upon the part of plaintiff not to sell to the Patrons of Husbandry outside of Howard county. It is conclusively presumed that the written contract contains everything that was agreed upon by the parties, and that all prior or contemporaneous colloquies are merged in the contract. But the letter is admissible for the

The Wilson Sewing Machine Co. v. Sloan.

purpose of showing a false and fraudulent representation of the then existing condition of things, for the purpose of inducing the defendant to enter into the contract.

III. The court instructed that if the defendant is entitled to recover for a breach of the contract the measure of his damage is—"First, a reasonable compensation for time actually and necessarily spent in preparing for and working up a trade in such machines, which was rendered of no avail or value in consequence of the breach; and, second, the difference in the value of the agency sold to the defendant as it would have been without the breach, and its value with the breach; and the value of such agency depends upon the number of machines the defendant could have sold with reasonable diligence, and what would have been the necessary cost of labor and expense in making such sales; and in passing upon this question you are admonished to guard against any imaginary or speculative profits from the business, or estimating a larger number of sales than would have occurred with reasonable certainty, taking as the basis of your calculation the actual sales defendant was making before the breach, the number of sales of the same machine made by others, the number of inhabitants to be supplied, the competition with other machines, and the character of the machine in question. And as to the time the agency was to run you will fix the limit when it really did cease, as shown by the evidence, and in no event extending the time beyond that in which the defendant continued his labors as such agent."

The direction that the jury should consider the value of the agency sold to defendant, depending upon the number of machines the defendant could have sold, with reasonable diligence, in view of the sales made by defendant before the breach, the number of sales of the same machines made by others, the number of inhabitants to be supplied, the competition with other machines, and the character of the machine in question, is in conflict with the holding of the majority of this court in

The State v. Brannon.

The Howe Machine Co. v. Bryson, 44 Iowa, 159. Under the doctrine of the majority of the court in that case the measure of the defendant's damage is the value of the defendant's time during the period he was employed under the contract, estimated without reference to the profits, with reasonable expenses added, less the sum actually earned during the time. The writer hereof, and BECK, Ch. J., adhere to the views expressed in the dissenting opinions in that case.

Because of the conflict of the instructions given with the rule recognized in *Howe Machine Co. v. Bryson*, the judgment is

REVERSED.

THE STATE V. BRANNON.

1. **Criminal Law: INDICTMENT: DUPLICITY.** An indictment cannot be attacked for duplicity which sets out the same transaction in forms varied to meet the testimony.

Appeal from Warren District Court.

THURSDAY, MARCH 20.

On the 10th day of January, 1877, there was filed in the office of the clerk of the district court of Marion county an indictment, as follows:

"1. The grand jury of the county of Marion, in the name and by the authority of the State of Iowa, accuse the defendants, John Brannon and Eliza Flanders, of the crime of buying, receiving and aiding in concealing stolen money, committed as follows: The said John Brannon and Eliza Flanders, on the 14th day of November, A. D. 1876, in the county aforesaid, the sum of three thousand dollars, of the personal goods and chattels of Marion county, Iowa, of the value of three thousand dollars, feloniously did buy, receive and aid in concealing; the said John Brannon and Eliza

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Flanders then and there well knowing that said three thousand dollars was stolen money, and that John R. Barcus and Harry Williams, on the 10th day of October, A. D. 1876, at the county aforesaid, feloniously did take, steal and carry away said three thousand dollars, the same being the personal goods and chattels of the said Marion county, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Iowa.

"2. And the grand jury of the county of Marion, in the name and by the authority of the State of Iowa, further accuse the said John Brannon and Eliza Flanders of the crime of buying, receiving and aiding in concealing stolen money, committed as follows: The said John Brannon and Eliza Flanders did, on the 14th day of November, 1876, in the county of Marion aforesaid, the sum of three thousand dollars, good and lawful money of the personal goods and chattels of one R. M. Faris, of the value of three thousand dollars, feloniously did buy or receive and aid in concealing; the said John Brannon and Elizabeth Flanders then and there well knowing the said three thousand dollars was stolen money, and that John R. Barcus and Harry Williams, on the 10th of October, 1876, at the county aforesaid, feloniously did take, steal and carry away said three thousand dollars, the same being the personal goods and chattels of the said R. M. Faris, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Iowa.

"3. And the grand jury of the county of Marion, in the name and by the authority of the State of Iowa, further accuse John Brannon and Eliza Flanders, aforesaid, of the crime of buying, receiving and aiding in concealing stolen money, committed as follows: The said John Brannon and Eliza Flanders, on the 14th day of November, A. D. 1876, in the county aforesaid, the sum of three thousand dollars, of the personal goods and chattels of Marion county, Iowa, before then feloniously stolen, taken and carried away, feloniously

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did buy, receive and aid in concealing; the said John Brannon and Eliza Flanders then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Iowa.

“4. And the grand jury of the county of Marion, in the name and by the authority of the State of Iowa, further accuse the said John Brannon and Eliza Flanders of the crime of buying, receiving and aiding in concealing stolen money, committed as follows: The said John Brannon and Eliza Flanders, on the 14th day of November, A. D. 1876, in the county aforesaid, three thousand dollars good and lawful money, of the value of three thousand dollars of the personal goods and chattels of one R. M. Faris, before then feloniously stolen, taken and carried away, feloniously did buy, receive and aid in concealing; the said John Brannon and Eliza Flanders then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Iowa. And the grand jury do further say that each and every one of the counts of this indictment are based upon and grew out of the same transaction, and that the crime set forth in each and every count of this indictment grew out of and is based upon the same transaction.”

The defendant, John Brannon, entered his plea of not guilty, and upon his motion the venue in the cause was changed to the Warren District Court. The cause was tried and the defendant was found guilty, as charged in the indictment, and the value of the money which he aided in concealing was found to be three thousand dollars.

The defendant filed a motion to set aside the verdict and for a new trial, upon the ground, among others, that there is a separate and distinct offense charged in each of the four counts of the indictment. The motion was overruled and

The State v. Brannon.

the defendant was sentenced to imprisonment in the penitentiary for four years. The defendant appeals. The cause is submitted upon the abstract alone, without argument from either party. None of the evidence is contained in the abstract.

Geo. W. Seever, for appellant.

J. F. McJunkin, Attorney General, and *T. J. Anderson*, for the State.

DAY, J.—Without determining whether the question as to duplicity in an indictment can be raised for the first time in a motion to set aside the verdict, and for a new trial, we feel constrained to hold that the indictment in question is not vulnerable to the objection presented. The Code, § 4300, provides: “The indictment must charge but one offense, but it may be charged in different forms to meet the testimony.” The only difference between the first and second counts of the indictment is that the first charges that the money which the defendant aided in concealing belonged to Marion county, while the second count charges that it belonged to one R. M. Faris. The third count of the indictment differs from the first, in that the first count charges that the money which the defendant aided in concealing was stolen by John R. Barcus and Harry Williams, while the third count is silent as to the person by whom the money was stolen. The fourth count differs from the second in the same respect. It is alleged in the indictment that all the counts are based upon and grew out of the same transaction, and that the crime set forth in each and every count grew out of and is based upon the same transaction. It is very apparent that the indictment charges but one transaction, in forms varied to meet the testimony—the District Attorney evidently being in doubt, from the testimony, whether the money concealed belonged to Marion county or to R. M. Faris, and whether the evidence would authorize the jury to find

1. CRIMINAL
law : indict-
ment : dupli-
city.

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that it was stolen by John R. Barcus and Harry Williams. Under section 4300 of the Code the offense may be charged in this manner. In *State v. McPherson*, 9 Iowa, 53, it is said: "Cases might arise where the indictment upon its face would show that different offenses were included, as if larceny and perjury should be charged. Where it is not thus apparent, other parts of the record should make it appear in some method that the counts relate to distinct offenses or transactions."

In this case it appears upon the face of the indictment that the counts relate to the same transaction. The indictment does not, therefore, charge more than one offense. No other question is properly presented by the record for our consideration.

AFFIRMED.

THE BLAIR TOWN LOT AND LAND CO. v. WALKER.

1. **Equitable Jurisdiction: COMPULSORY REFERENCE.** Where a contract between the parties has been established or admitted, and there remains thereunder a series of calculations which are necessary to the establishment of the rights of the parties, it is within the province of the court to order a compulsory reference. BECK, Ch. J., *dissenting*.
2. **Contract: CORPORATION.** A contract between the officers of a corporation, by which such officers were to derive advantage or profit from their positions, by purchases made nominally for the company but really for themselves, is void as against the other stockholders.

Appeal from Linn District Court.

THURSDAY, MARCH 20.

ACTION to recover certain moneys received by the defendant as assistant treasurer and general agent of the Iowa Railroad Contracting Company, which it is alleged he has converted to his own use, and it is alleged the claim has been assigned to the plaintiff. After issue had been joined the court, upon plaintiff's motion and against defendant's objection, sent the

280	376
88	7
50	376
4114	616
50	376
280	677
50	376
140	507

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case to a referee, who made report of the evidence, his findings of fact and law, and the court rendered judgment thereon for the plaintiff. The defendant appeals.

Preston & Son and Boal & Jackson, for appellant.

I. N. Kidder and E. S. Bailey, for appellee.

SEEVERS, J.—I. It is objected that the court did not have the power and authority to refer this cause against the objections of the defendant. A determination of this question requires a full statement of the pleadings. The petition seeks to recover of the defendant certain money intrusted to him in 1863, 1865, 1868 and 1869, as assistant treasurer and general agent of the Iowa Railroad Contracting Company, for which he had failed and refused to account.

The answer admitted the receipt of the money, but denied any indebtedness therefor, and it is averred "that the Iowa Railroad Contracting Company has credit for each of said sums for the full amount thereof; and by way of cross-claim against the said plaintiff this defendant claims the sum of one hundred and eighty-nine thousand one hundred and forty dollars, which he alleges to be due him from said plaintiff, and for cause of such claim states that the Iowa Railroad Contracting Company and the plaintiff are two corporations, largely if not entirely composed of the same persons, and interested in the same property; that the Iowa Railroad Contracting Company built a portion of the Cedar Rapids & Missouri River Road from Cedar Rapids to the Missouri River; that John I. Blair was the president of said contracting company; that said Blair, as such president, for and on behalf of said contracting company, entered into a verbal contract with this defendant whereby this defendant was to purchase and procure donations of lands (the said Blair to furnish the money to pay for all purchases so made) along the line of said railroad—this defendant to take the title to all of said

1. **EQUITABLE**
jurisdiction:
compulsory
reference.

The Blair Town Lot and Land Co. v. Walker.

lands in the name of said Blair, in trust and for the use of said contracting company; said lands to be laid out into town lots, when deemed advisable, and this defendant was to take charge of selling said town lots and lands, and have the general management of said business; said Blair, as president, agreeing, in behalf of said contracting company, to pay this defendant a reasonable per centage for all sales of town lots so procured under said agreement, and further agreeing to let defendant have a one-half interest in all lands so purchased and not laid out into lots, after deducting purchase money and interest thereon, at the rate of seven per cent, and taxes on the same, or half interest in the profits arising thereon. In pursuance of said agreement defendant examined the country along the line of said road, procured donations and purchased a large quantity of land—the exact amount defendant is unable to state.” It is then stated that a portion of the lands so purchased were laid out into town lots, and the same sold for three hundred and fifty-eight thousand five hundred and twelve dollars and four cents, “for which this defendant is entitled to ten per cent commission, amounting to the sum of thirty-five thousand eight hundred and fifty one dollars and twenty-one cents; that the moneys claimed in plaintiff’s petition, to-wit: six thousand two hundred and fifty-two dollars and twenty-nine cents, received by this defendant, were credited to said contracting company, to apply on his percentage on account of the sale of the town lots aforesaid.” It is also averred that in July, 1871, the lands remaining unsold, which had not been laid out into town lots, amounting to fifteen thousand three hundred and nineteen and eighty-eight one-hundredth acres, were conveyed to plaintiff, and that defendant was “entitled to a one-half interest in the same, or one-half the profits of said purchase, after deducting costs, taxes and interest as aforesaid.”

It is further averred “that at the time said Blair conveyed and transferred said lands to said plaintiff, as aforesaid, the

The Blair Town Lot and Land Co. v. Walker.

plaintiff had full notice of the interest of this defendant in the same, and of the percentage due defendant on account of the sales aforesaid; and plaintiff then undertook and agreed to assume and account to this defendant for his interest in said lands, and also for all moneys due him on account of the sales made as aforesaid, and to hold said Blair and said contracting company harmless from liability to this defendant on account of his interest therein."

It is averred, as a further cause of such cross-claim, that the contract for the purchase of the lands was made with John I. Blair, as we understand, in his individual capacity. The terms and conditions of the contract are the same as above stated, and the defendant makes the same claim thereunder as aforesaid.

The defendant prays relief as follows: "Wherefore, defendant says that by reason of the premises aforesaid he is entitled to an accounting from said plaintiff for the town lots sold since the 24th day of July, 1871, and that defendant is entitled upon said accounting to one-half the profits arising from the sale of such lands and lots, after deducting the costs, interest and taxes," and judgment is asked against the plaintiff for one hundred and eighty-nine thousand one hundred and forty dollars.

In a further pleading, and "by way of further, more specific and other cross-claim against plaintiff," the defendant states that he entered into a contract with John I. Blair for himself only, and that said Blair, for himself and defendant, made the contract which is set out, and the same is substantially, in other respects, like that above stated, so far as the question now under consideration is concerned.

The plaintiff replied to the pleadings filed by defendant, and denied the several matters therein stated, or alleged other things in avoidance thereof. Such being the issue, did the court err in referring the cause?

If, under the pleadings and issues joined, the cause or causes of action, either under the petition or answer and cross-

The Blair Town Lot and Land Co. v. Walker.

petition, were cognizable in a court of equity, or triable therein under the established chancery practice, then the court did not err in referring the whole of the causes of action against the objection of the defendant. For it was not objected below or here that a portion of the issues only was triable in chancery, but that no portion was. The constitution provides that "the right of trial by jury shall remain inviolate," and it is provided by statute "that the court, on its own motion, when the parties do not consent, may direct a reference in either of the following cases: *First*, when the trial of an issue of fact shall require the examination of mutual accounts; or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party should be examined as a witness to prove the account. * * * * * *Second*, * * * * *. *Third*, when a question of fact shall arise in any action by equitable proceedings. * * * " Code, § 2816. Counsel for the appellant in argument say: "By the letter of this statute the reference might be made, but the courts are not free to assert and enforce the letter of the statute. In doing so they cannot maintain 'inviolable' the right of trial by jury, for 'the examination of the mutual account or accounts in which it may be desired to examine the adverse party as a witness' may become necessary in the simplest form of 'ordinary action.' * * * Hence this court has said, in *Benedict v. Hunt*, 32 Iowa, 27, * * * 'we must look into jurisdiction of courts of equity in matters of account.' "

Section 2816 of the Code in substance is identical with Revision, § 3090, with reference to which it was said by COLE, J., in *McMartin v. Bingham*, 27 Iowa, 234, that "our Code has specified the precise matter which was formerly of equitable cognizance, and as to which, of course, in that court, there was no right of trial by jury. * * * Where a case falls within the rules of equitable cognizance, as correctly specified by the Code, there should be no hesitation in the exercise of the power of compulsory reference."

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It is admitted in the answer that the amount claimed by the plaintiff was received by the defendant, but it is claimed the same has been properly credited on certain moneys due him under the contract with Blair. The amount claimed to be due the defendant under the contract greatly exceeds the amount claimed by the plaintiff. The compensation under the contract which the defendant seeks to recover consists of certain profits which have accrued from the sales of lands and town lots, and also because of certain lands which remain unsold. Before such profits can be ascertained the purchase price of the lands must be shown, interest thereon computed, and the amount paid for taxes proved. Such amount, whatever it may be, must then be deducted from the amount received for lands and lots sold, and the profits thus ascertained. But as to the lands not sold the value thereof must be ascertained, in addition to the matters aforesaid. There exists, of course, the contingency that no profits have accrued, because the expenses, including the purchase money, may exceed the money received for lands sold, and the present value of the unsold lands.

The defendant asks that an accounting of the matters aforesaid be had. Such is unknown to a purely legal action, but it is freely granted in an equitable proceeding. Such a remedy it is the peculiar province of courts of equity to administer. This has been so since the action of account was abolished or abandoned at law, the accounting in equity having taken its place. The jurisdiction of equity, in this respect, has never been accurately defined. It is, indeed, doubtful whether it can be done. In Story's Equity Jurisprudence, § 454, it is said: "One of the most difficult questions arising under this head is to ascertain whether there are any, and, if any, what are the true boundaries of equity jurisdiction in such matters of account as are cognizable at law."

It is true no discovery is called for by the defendant, and it is equally true that his demands are not for goods sold, money had and received, or for services rendered; and unless

The Blair Town Lot and Land Co. v. Walker.

he can show he is entitled to some amount, as profits under the contract, the plaintiff must recover the full amount claimed.

The account or transaction out of which the profits, on the defendant's theory, have accrued, is exceedingly complicated. Conceding the contract to be established before the profits of the venture can be ascertained a series of calculations must be made. The lands were purchased at different times; the amount paid for each parcel was not the same; the taxes paid on each tract may or may not be the same; and interest must be calculated not only on each purchase, but also, we think, on each payment of taxes.

When the contract is established, and the amount of money paid out thereunder is ascertained, there remains a series of calculations to be made before the profits can be determined. Surely such calculations, and all matters connected therewith, can be much better made and ascertained by a competent referee than by a jury of twelve persons not versed therein.

In section 457, Story's Equity Jurisprudence, it is said: "Another and more general ground has been asserted for the jurisdiction, and that is, not that there is no remedy at law, but that the remedy is more complete and adequate in equity; and, besides that, it prevents a multiplicity of suits."

An examination of the accounts introduced in evidence by the defendant satisfies us that to try this case before a jury would be a mockery. The time required to try the case before a jury, and the fact that it can be more expeditiously done before a referee, and a correct result more nearly attained, satisfies us, under all the circumstances of the case, that the court did not err in making the reference, because the remedy is "more complete and adequate," and for that reason, if no other, equity has jurisdiction.

II. The appellant insists that Blair furnished the money with which the lands were purchased, and that he individually made the contract, and that the contracting
2. CONTRACT :
corporation. company had no interest therein.

Blair was president and the defendant assistant treasurer

The Blair Town Lot and Land Co. v. Walker.

and general agent of the contracting company at the time the alleged contract was made. The defendant received all the money which came into his hands from or through Blair. The money so furnished was kept by the defendant as a common fund, and paid out for the purchase of lands or legitimate charges against the company, connected with or growing out of the construction of the road. The funds now claimed to have been furnished by Blair for the special purpose of paying for these lands were charged on the books of the company to the defendant as general agent or otherwise, and no distinct or independent account thereof kept. Any one examining the books must have come to the conclusion that all the money specified in the books belonged to the company.

When money was paid out for lands a voucher was made out in the name of the company therefor, and a receipt taken in its name for the money so paid. These vouchers were kept with others, which, it is conceded, contained legitimate charges against and payments by the company. The defendant's time, as an employe of the company, was required to perform duties he was compelled to perform under the alleged contract. Not only so, but other employes of the company performed services under the direction of the defendant in selecting and attending to said landed interests.

For the services so rendered said employes were paid by the company. We have looked in vain for any testimony showing that any difference whatever was made between said lands, the money contributed for the purpose of purchasing the same, and any other matter which legitimately belonged to the company, until long after the lands were purchased, when, according to the testimony of the defendant, Blair directed him to change the accounts, or eliminate from the same in the company's books the items in relation to the lands.

At the time the alleged contract was made, and during the time the lands were being purchased, Blair and defendant were directors in the company, and members of the executive

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committee, and as such practically had charge of the construction of the road, including the location of stations and depots; and for locating the same at certain points donations of lands were exacted. At the stations so established towns were laid out and lots sold. All this being done, it is claimed, under the alleged contract.

We are satisfied that the other stockholders believed, and had reason to believe, the lands were purchased for the use and benefit of the company. Some of them so testify, and that Blair assured them such was the fact.

After a time disputes arose between them and Blair in relation to matters connected with the construction of the road, including the ownership of the lands and moneys received from the sale of portions thereof.

The conclusion is forced on us, from the matters above stated, that the defendant must have understood, during the time the lands were being purchased, that the same were purchased for the use and benefit of the company. His acts and conduct at the time, and for some time afterward, irresistibly lead to this conclusion. His explanation of the manner of keeping the accounts is that the books were regarded as temporary, and that he did not desire that certain stockholders should know he had such a contract. This is far from satisfactory, and to our minds clearly insufficient.

If wrong in this, we are unable to believe Blair and the defendant could legitimately use their position as officers and directors of the company for their personal aggrandizement, as contemplated by the contract. Without saying the same was done, they had opportunity to locate stations, if the contract were legitimate, in furtherance of their own interest, at the expense of the company. The lands were purchased in the vicinity of the road, and their value enhanced by its construction. That Blair and the defendant might properly purchase lands the same as other individuals, and advantageously use and have the benefit of their positions, and knowledge derived therefrom, as aids in making selections,

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may be conceded, provided they did so openly, and with the knowledge, either express or implied, of the company or their associates. Green's Brice's Ultra Vires, 401-2.

So far from the company or the other stockholders giving their consent to Blair making the purchases for himself individually, they had just the contrary belief and expectation. Neither Blair nor the defendant could derive any advantage or benefit from purchases so made, and the contract alleged to have been made as against the company was void.

III. It is insisted that the claim or account sued on never has been assigned to the plaintiff; but we think otherwise. The testimony of Blair, certain writings executed by him, and the action of the contracting company in the passage of certain resolutions, satisfies us that the claim sued on has been assigned to, and is the property of, the plaintiff. The length of this opinion forbids a discussion of the evidence further than has been done, and no possible benefit could be derived therefrom.

AFFIRMED.

BECK, CH. J., *dissenting*.—I think the court erred in sending the case to a referee. This point I will briefly examine. The statute upon the subject of reference demanding consideration in this case is found in the following provisions of the Code:

"Section 2815. All or any of the issues in an action, whether of facts or of law, or both, may be referred upon the consent of the parties, either written or oral, in court, entered upon the record.

"Section 2816. When the parties do not consent the court may, upon motion of either, or upon its own motion, direct a reference in either of the following cases:

"1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the

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referee may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or—

“2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or—

“3. When a question of fact shall arise in any action by equitable proceedings, in which case the court, in the order of reference, shall prescribe the manner in which the testimony shall be taken on the trial.”

It will be observed that, without the consent of the parties, references may only be had in cases cognizable in equity. The settlement of mutual accounts, and the taking of accounts contemplated in the first and second paragraphs of section 2816, are matters, it is presumed, of which a court of chancery has jurisdiction. It is not intimated, however, that when issues arise in actions at law involving matters of this character, they may not be referred without consent of the parties.

It is claimed by plaintiff that the issues of fact in the case required the examination of mutual accounts, and that the defendant's answer, setting up his cross-claim, presents an equitable cause of action. Upon this ground the ruling of the court ordering the reference seems to have been made. It, therefore, demands consideration.

Let me state briefly the issue in the case. The petition claims to recover for money received by defendant. The receipt of the money is admitted in defendant's answer. His liability therefor is denied on the ground that it was applied toward the payment of a sum due from plaintiff under the contract. It is plain that the issues arising upon the petition do not require such settlement or examination of mutual accounts as to bring the case within the statute above quoted. We do not understand this is claimed by plaintiff's counsel. The issues upon the petition, therefore, require no further consideration.

The cross-petition of defendant sets up a contract with

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another party, under which he rendered services for which he was, by the terms of the contract, to be paid a certain compensation. It is alleged that plaintiff assumed the performance of this contract. The original contract, as well as the contract of plaintiff, is denied in the answer to the cross-petition. Special defense, as that the contract is within the statute of frauds and is without consideration, is also pleaded. It is impossible to say that these issues involved the examination of mutual accounts. The plaintiff does not claim to hold any account against defendant, other than that set up in the petition, which, being admitted by the defendant, is not in issue.

The defendant's claim against plaintiff rests upon an alleged contract for services. While defendant may be said, in common language, to hold an "account" against plaintiff, we think his claim is not a matter of "account" of which equity takes cognizance. Under all contracts for services "accounts" of like character may exist. The "account" in this case may be unusually prolix, and require a long time to adjust it, but these are not grounds of equitable cognizance. The mere fact that a case involves the examination of an account, using the word in its common acceptation, will not give chancery jurisdiction thereof.

In order to understand this subject clearly, attention must be given to the doctrines and rules of equity applicable to this subject. They are familiar to the profession, and cannot be the subject of controversy. They are summarized by Justice STORY in the following language:

"So that, on the whole, it may be laid down as a general doctrine that in matters of account growing out of privity of contract courts of equity have a general jurisdiction where there are mutual accounts; and *a fortiori* where these accounts are complicated, and also where the accounts are on one side, but a discovery is sought and is material to the relief. And, on the other hand, where the accounts are all on one side, and no discovery is sought or required; and, also, where there

The Blair Town Lot and Land Co. v. Walker.

is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side, and no discovery is sought or required, in all such cases courts of equity will decline taking jurisdiction of the cause. The reason is that no peculiar remedial process or functions of a court of equity are required; and if, under such circumstances, the court were to entertain the suit, it would merely administer the same functions in the same way as a court of law would in the suit. In short, it would act as a court of law." 1 Story's Equity Jurisprudence, § 459. See, also, *McMartin v. Bingham*, 27 Iowa, 234.

It is not claimed that there are *mutual* accounts in the case, nor is a discovery claimed.

The trial may involve the examination of many items which constitute the claim of defendant. This does not give equity jurisdiction. It may involve the examination into the state of the accounts of the two contracting companies, of Blair and of plaintiff, relating to the purchase and sale of lands and lots; but defendant does not base his right to recovery upon these accounts, and plaintiff cannot claim that they are accounts against defendant. They are examined for the purpose of determining the amount of compensation defendant ought to recover under the terms of the contract. Facts disclosed therein constitute the basis of compensation in such investigation.

I reach the conclusion that the District Court erred in ordering the reference without the consent of the parties, and that the judgment of the District Court ought to be

REVERSED.

Eisfeld v. Kenworth.

EISFELD V. KENWORTH ET AL.

1. **Corporations: ORGANIZATION AND PUBLICITY.** The word "and" in section 1068 of the Code should be read as "or," and stockholders of a corporation are held where there is a failure to comply substantially with the requirements of the statute with respect to organization or publicity.
2. ———: **PUBLICATION.** The failure to publish a notice of incorporation is a substantial failure, subjecting the corporators to individual liability.

50	389
82	282

50	389
86	201

50	389
110	149
110	150
110	151

50	389
115	677

50	389
132	279
132	505

Appeal from Louisa District Court.

TUESDAY, APRIL 8.

THE plaintiff is a judgment creditor of a corporation known as The Co-operative Store of Morning Sun and vicinity. The defendants are stockholders. This action is brought to subject the property of the defendants, as such stockholders, to the payment of the judgment. The petition avers as the ground of such liability that the articles of incorporation were dated April 7, 1874, and purported to be adopted under chapter 52, article 1 of the Revision of 1860, which was not then in force; also that the defendants failed to comply with the law in relation to publicity, and failed to have a copy of the articles filed in the office of the Secretary of State within three months from the date of filing in the recorder's office. To the petition the defendants demurred, and the court sustained the demurrer. The plaintiff appeals.

Blake & Hammack, for appellant.

Hall & Baldwin and *Charles Baldwin*, for appellees.

ADAMS, J.—I. The fact that the articles purport to be adopted under the Revision of 1860 we deem immaterial. If the corporation complied with the statute in force, and provided for the exemption of private property, it would be exempt.

Eisfeld v. Kenworth.

II. The petition avers a failure to file the articles of incorporation in the office of the Secretary of State. But in *The First National Bank of Davenport v. Davies*, 43 Iowa, 424 (436), this was held by a majority of the court to be insufficient to render the stockholders individually liable.

III. If they are held liable in this case they must be held under the averment that they failed to comply with the law in relation to publicity. The question raised involves a construction of section 1068 of the Code. That section provides that the stockholders may be held where there is a failure to comply substantially with the requisitions of the statute in regard to organization and publicity. The petition shows merely a failure to comply with the statute in regard to publicity, and does not show that there was a substantial failure even in regard to that.

The appellees contend that in the construction of the statute some force must be given to the word *substantially*, as used in it. It is not to be denied that the use of that word implies that there may be a failure to comply with the statute which is not a substantial failure. The petition not only fails to aver that there was a substantial failure, but fails to aver in what the failure consisted, so as to enable us to judge whether it was substantial or not. We might be in great doubt, therefore, whether, taking the petition as it stands, we ought to regard it as sufficient. But the counsel for the appellant say, in their argument, that the failure consisted in not publishing any notice whatever; and the counsel for the appellees say, in their argument, that the case may be decided upon that theory. We have, then, two questions to be determined: *First*, whether the failure that shall be sufficient to give rise to individual liability must extend to both organization and publicity, and, if it need extend only to publicity, then, *second*, whether a failure to publish any notice whatever is a substantial failure.

As to the first question we have to say that it seems to us

Eisfeld v. Kenworth.

unreasonable to hold that the Legislature intended that the corporators might, with impunity, omit either organization or publicity, and would be liable only in case they omitted both. The use of the word "and," if taken in its grammatical sense, as a conjunctive, would favor the construction for which the appellees contend. But the word "and" may be read as "or," if other considerations sufficiently potent require it. *State v. Brandt*, 41 Iowa, 593 (615); *State v. Smith*, 46 Iowa, 670. We think it should be so read in this case.

As to the second question we have to say that we think that the failure to publish any notice whatever is a substantial failure. Section 1064 of the Code provides that the corporation may commence business as soon as its articles are filed in the recorder's office, and that its doings shall be valid if the publication shall be made in a newspaper within three months. Here is a clear implication that its doings will not be valid (by which we understand that they will not be valid as corporate acts) unless the publication is made within three months. Of course whoever participates in, authorizes or accepts the benefits of the things done would become responsible for the things done. But if what is done is not valid as a corporate act, by reason of a failure to publish notice, then the failure is a substantial failure. That it is so seems to have been assumed in *Bayliss v. Swift*, 40 Iowa, 648. It is objected to this view that it is unreasonable to suppose that the Legislature would attach so much importance to the publication of notice. But where a body of men, large or small, contract a liability, but with the design of escaping individual liability, there is much reason for providing not only that they shall provide for individual exemption by recorded articles, but shall publish to the world the fact that they claim such exemption. It is true that the publication could not be presumed to give actual notice to a very large number of those who may deal with the corporation. The publication need continue only four weeks,

 Bridgman & Co. v. Miller.

while the corporation may by renewal continue indefinitely. Still the publication would tend to fix the character of the corporators as doing business under a claim of individual exemption, and those who deal with them may properly enough be required to take notice of it.

It is urged by the appellees that, as there is no provision for preservation of proof of publication, a great hardship might accrue to stockholders by reason of loss of proof, if a failure to publish is held to render them individually liable. To this we think it is sufficient to say that the burden of proving the failure rests upon the party who asserts the liability. Such is evidently the meaning of the statute. Now, where publication is actually made, we think that there is little danger that a creditor would succeed in adducing satisfactory evidence that it had not been made.

In our opinion the demurrer was improperly sustained, and the judgment must be

REVERSED.

BRIDGMAN & Co. v. MILLER ET AL.

1. **Judgment : REVIVOR AGAINST HEIRS.** The property left by a decedent cannot be subjected to the claim of a judgment creditor by an action to revive a judgment against the heirs of the decedent.

Appeal from Appanoose District Court.

TUESDAY APRIL 8.

THIS is a proceeding to revive and enforce a judgment against property in the hands of the heirs of one deceased, which, it is alleged, was owned by their ancestor in his lifetime. A demurrer to the petition was sustained, and plaintiffs appeal. The facts of the case appear in the opinion.

H. Tannehill, for appellants.

Geo. D. Porter, Vermillion, Haynes & Vermillion, for appellees.

Bridgman & Co. v. Miller.

BECK, CH. J.—I. The petition alleges that in 1859 plaintiffs recovered a judgment against John Miller and Samuel Clark, who were copartners; that at no time since the rendition of the judgment has there been any partnership property against which the judgment could be enforced; that Miller died intestate in 1865 or 1866, and no administration upon his estate has ever been granted, and the time for the appointment of an administrator has long since expired; that certain heirs of Miller survive him, who are made parties to this action; that prior to the death of Miller one of his sons died leaving an estate of which one of the defendants was appointed administrator; that all debts against the estate have been paid, and eight hundred and forty-six dollars and interest are now in the hands of the administrator to be distributed or disposed of as provided by law, and that this money ought not to be distributed to the heirs of John Miller until the debts contracted by him in his life-time are paid. The plaintiffs aver that they did not cause administration to be taken upon the estate of Miller for the reason that they understood it to be insolvent, and they did not know the estate was entitled to any property left by the son of the deceased.

The relief asked is that the judgment of plaintiffs be revived against the heirs of John Miller, and that the money in the hands of the administrator of the son be subjected to the judgment. It is not asked that the judgment run against the heirs personally.

To the petition defendants demurred on the ground, among others, that plaintiffs cannot subject the money sought after to the judgment by this proceeding, and in the manner proposed. The demurrer was sustained.

II. It will be observed that no letters of administration have been issued upon the estate of John Miller; that there were assets of the estate at the decease of the intestate, for the money in question is property, or the proceeds of property, which Miller inherited from his son, who died before the death of Miller.

Bridgman & Co. v. Miller.

The question presented in the case before us is this: May the property left by one deceased be subjected to the claims
1. JUDGMENT: of the creditors by proceedings of this character,
revivor against heirs. without the appointment of an administrator and the proceedings prescribed by law for the settlement of estates and the payment of debts of decedents?

We know of no rule of law which will permit a creditor to pursue any other course than that prescribed by the statute for the enforcement of his claim against the property of his deceased debtor. Surely it cannot be claimed that a proceeding of the character of the one before us may be instituted against the heirs, while administration may be had upon the estate. It cannot be that, after the right to administer upon the estate is cut off, this proceeding would then become lawful. If creditors are compelled to pursue the course pointed out by the statute in order to collect their debts, it is very plain that when such a remedy is barred by time the right is cut off by the statute.

But it is said, and so averred in the petition, that the plaintiffs did not take out letters of administration for the reason they did not know the decedent left an estate. The law nowhere provides that, for reasons of this kind, a creditor may pursue a course other than the one pointed out by the statute.

If the want of knowledge of property belonging to the estate creates an equity or right in the creditor to enforce his claim after the time limited by the statute for taking out administration (Code, § 2367), it would appear that the equity and right ought to be enforced in the manner prescribed by law—that is, through administration upon the estate—and that if such an equity exists, which may be enforced, it would authorize administration after the limitation prescribed in Code, § 2367. But this point we do not determine. We simply hold that the proceedings prescribed by the statute must be pursued by the creditor, and if he neglects to institute them until after they are barred by Code, § 2367, he cannot have a rem-

Seaton & Spaan v. Hinneman.

edy by an action against the heirs or others holding property that belonged to the decedent in his life-time.

We are of the opinion that the ruling of the District Court upon the demurrer is correct.

AFFIRMED.

SEATON & SPAAN v. HINNEMAN.

1. **Promissory Note: ACTION UPON: INSTRUCTION.** In an action upon a promissory note, commenced before maturity, it is competent for the court to instruct the jury to find for defendant.
2. ———: **ASSIGNMENT OF: BANKRUPTCY.** The assignee of a note before maturity, with notice of bankruptcy proceedings commenced against the maker, cannot maintain an action thereon.
3. **Jurisdiction: FEDERAL COURTS.** The fact that bankruptcy proceedings have been commenced may be shown in a State court by a debtor, for the purpose of proving that the right of action upon an instrument sued on has vested in the assignee.

Appeal from Lee Circuit Court.

TUESDAY, APRIL 8.

On the 1st day of April, 1876, the plaintiffs brought suit before a justice of the peace, as the indorsees of a negotiable promissory note for one hundred dollars, executed by defendant to one E. J. Bruce, dated February 1, 1876, due sixty days after date, with interest at ten per cent from maturity.

The defendant answered, alleging that the note was given for whisky, to be sold in violation of law, and that a suit in bankruptcy is pending against the indorser, E. J. Bruce, and the assignment of the note was made by him within the time prohibited by law, and is void. On the 8th day of April, 1876, the cause was tried, and judgment was rendered for the plaintiff. The defendant appealed to the Lee Circuit Court. In that court it was shown that an involuntary petition in bankruptcy was filed in the United States District

50	395
81	395
50	395
82	395
50	395
106	395
50	395
el30	393

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Court against E. J. Bruce, on the 15th day of March, 1876. On the 25th day of March, 1876, an answer to said petition was filed by Seaton & Spaan, the present plaintiffs, as attorneys for Bruce. On the 11th day of November, 1876, the effects of Bruce were assigned to W. C. Stripe, assignee in bankruptcy. On the 17th day of November, 1876, Bruce was adjudged a bankrupt, and on the same day the assignee was discharged. The assignment to plaintiffs was made in part payment of attorney's fees.

Under the instructions the jury found for the defendant. The plaintiffs appeal.

Lee R. Seaton, for appellants.

Gillmore & Anderson, for appellee.

DAY, J.—The court refused all the instructions, fifteen in number, asked by the plaintiffs, and instructed the jury as follows: "In this case it is shown that, the note in question being negotiable, the suit, under the law, was brought before the maturity of the note; and it being further shown, by uncontradicted evidence, that a petition in bankruptcy was filed against E. J. Bruce, the payee of the note in question, in the District Court of the United States, on the 15th day of March, 1876, and that said E. J. Bruce filed an answer to said petition, by his attorneys, Seaton & Spaan, the plaintiffs in this case, on the 25th day of March, 1876; and that said note was transferred by E. J. Bruce to plaintiffs, on the 1st or 2d day of April, 1876, and that said E. J. Bruce, under said proceedings, was adjudged a bankrupt; that the plaintiffs had notice of the filing of said petition before said 1st day of April. The court, in view of the foregoing facts being established by uncontradicted evidence, instructs the jury to find a verdict for the defendant."

However correct, as abstract propositions, the instructions asked may have been, there was no error in refusing them, if the instruction above quoted was properly given.

Seaton & Spaan v. Hinneman.

I. The note in question is negotiable and entitled to three days of grace. Code, § 2092. It was executed February 1, 1876, and was payable sixty days after date. The last day of grace was April 4, 1876. The action was commenced April 1, 1876, before the note, according to its terms, matured, and hence could not be maintained when the action was brought. *Whitney, Galloup, Bliss & Co. v. Bird*, 11 Iowa, 407. The plaintiffs insist, however, that the non-maturity of the note was not pleaded, and that it was, therefore, improper to instruct respecting it. The petition filed in the justice's court showed upon its face that the action was brought before the note matured.

Section 2650 of the Code provides: "When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition the objection may be taken by answer. If no such objection is taken it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered." This is a case where the defect appears upon the face of the petition, and it is one, also, wherein the facts stated in the petition do not entitle the plaintiff to any relief. That the petition should have been held bad upon demurrer, if one had been interposed, there can be no doubt. Not only did the petition show upon its face that the plaintiffs were not entitled to maintain an action when the suit was commenced, but the proof introduced by the plaintiffs showed the same fact. It was competent, therefore, for the court to instruct the jury that, under the evidence submitted, the plaintiffs could not recover.

II. The abstract does not purport to contain all the evidence. It does not show when the indorsement to plaintiffs was made. In the absence of any showing to the contrary we must presume that the proof showed that the indorsement was made not earlier than April 1, 1876, as the court instructed, and hence after plaintiffs had knowl-

1. PROMISSORY
note: action
upon: instruc-
tion.

2. —: assign-
ment of: bank-
ruptcy.

Seaton & Spaan v. Hinneman.

edge of the commencement of proceedings in bankruptcy against their indorser Bruce. The petition in bankruptcy was filed March 15, 1876. The conveyance of the bankrupt's effects to the assignee was executed November 11, 1878. This conveyance related back to the time of the filing of the petition in bankruptcy, and from that date vested in the assignee all the property, both real and personal, of the bankrupt. Revised Statutes of the United States, §§ 5029 and 5044. The plaintiffs had actual knowledge of the commencement of bankruptcy proceedings at the time of their purchase of the note, and they cannot be regarded as innocent purchasers. As against them the conveyance to the assignee passed the title in the note in question to the assignee. The plaintiffs have no title therein and can maintain no action thereon.

III. It is claimed by appellants that the United States Courts have exclusive jurisdiction of all questions arising under the bankruptcy law, and that the matters
3. JURISDIC-
TION: federal
court. here insisted upon cannot be presented in a State court. We think, however, that the fact that bankruptcy proceedings have been instituted may be presented in a State court, by a debtor, for the purpose of showing that the plaintiff is not entitled to maintain an action, and that the right of action has become vested in the assignee in bankruptcy.

The judgment is

AFFIRMED.

Baker v. Massey.

BAKER ET AL. V. MASSEY ET AL.

1. **Conveyance: MISTAKE OF LAW : EQUITABLE JURISDICTION.** Where, under a mistake of law, a conveyance by a guardian was made to include an interest of his wards, which he and the grantee were alike ignorant of, it was *held* that equity would relieve the wards of the consequences of the mistake.

Appeal from Clayton District Court.

TUESDAY, APRIL 8.

JAMES M. MASSEY died intestate, in the year 1857, seized in fee simple of certain real estate in Clayton county. He left surviving him Sarah J. Massey, his widow, and six children, his only heirs. The defendants Alexander P. Massey and Charles Massey are two of these children. The said Sarah J. Massey (widow) afterward intermarried with Jarvis C. Baker, and she died in the year 1875. Jarvis C. Baker died intestate in March, 1876. During his life-time he became the undisputed owner of the shares of all the heirs of Massey in said real estate, excepting an interest of the two defendants to this action, which is the subject-matter in controversy.

This action was commenced by the heirs of Baker to quiet their title to said real estate. The defendants answered, averring in substance that on the 3d day of October, 1872, one Peter Blake, who was the guardian of defendants, filed his petition in the Circuit Court of Clayton county for leave to sell the interest of defendants in said land, but that by reason of a want of service of notice upon the defendants, and other defects in the proceedings, the court did not acquire jurisdiction of the defendants, nor of the subject-matter of the action. Certain proceedings were had, and an order of sale entered, and a sale and conveyance were made by said guardian to said Jarvis C. Baker. It is averred in the answers that in the contract made between said Peter Blake, guardian, and said Jarvis C. Baker, there was no negotiation

50	399
85	642
50	399
98	336
50	399
121	35
50	399
130	273
50	399
134	675
50	399
140	700

Baker v. Massey.

nor agreement for the sale of any interest of the defendants beyond the undivided one-third of two-thirds of the said real estate; "nor was it the intention of the said Peter Blake, acting as such guardian, to convey any greater interest; nor did the said Jarvis C. Baker have any different understanding, nor contract, nor pay for any greater interest; and if said pretended deed seeks to convey any greater interest, it was entirely through a mistake in the drawing of said deed, and contrary to the understanding and agreement of the parties thereto."

The cause was referred to Hon. L. O. Hatch to try and determine. The referee found and reported that the defendants were each entitled to an undivided one-eighteenth of the land. The court approved the report of the referee and entered a decree accordingly. Plaintiffs appeal.

Graham & Cady, for appellants.

R. E. Price and James O. Crosby, for appellees.

ROTHROCK, J.—I. It will be observed from the foregoing statement that, as James M. Massey died in 1857, his widow was entitled to only a life estate in one-third of his real estate. At his death each of the six children were entitled to one-sixth, subject to this life estate. The plaintiffs claim and defendants deny that the interest of the defendants in the one-third held by the widow passed by the guardian's sale. It may be proper to say that by the answer the validity of the proceedings for the guardian's sale are questioned. We think the referee correctly found that the court had jurisdiction of the parties and the subject-matter, and that the sale and deed were valid. However that may be, the cause was not tried on written evidence, and is not triable anew here, and it must be presumed that defendants are content with the decree of the court below, as they neither took exceptions nor appealed.

II. The petition of the guardian for the sale of the land

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set forth in a general way that the said minor defendants owned an interest therein, and prayed that said interest might be sold. The order of sale did not define the interest of the defendants in said real estate. It merely authorized Peter Blake to sell the real estate. The guardian's deed, made by Blake to Baker, after reciting that he had made application to the court to sell the real estate (describing it), and reciting the order of sale, contains this clause:

1. CONVEY-
ANCE: mis-
take of law:
equitable ju-
risdiction.

"And, whereas, also, the said guardian has given the bond, with sureties, required by law; and, whereas, also, the said guardian has sold the real estate hereinafter described (*being one-third part of undivided two-thirds of the said real estate which the said guardian was empowered to sell by said order of said Circuit Court*) to J. C. Baker, of Clayton county, in the State of Iowa, for the sum of one thousand four hundred dollars."

Then follows the conveyance, which purports to convey the land as guardian, supplemented with covenants of general warranty. It will thus be seen that the proceedings, from the application for the sale to the deed, do not describe or define the defendant's interest in the land. The only statement of the interest intended to be sold and conveyed is contained in the recital in the deed above set forth.

The referee made the following among other findings of fact:

"20th Fact. That said guardian, Peter Blake, in making said sale under said order, and Jarvis C. Baker in purchasing the interest of said Alexander P. Massey and Charles Massey, and the appraisers in appraising said interest under their commission, all acted under the belief that the widow of James M. Massey, who was then living, owned in fee simple as her dower one undivided third of all the lands in question, and that the interest of each of the two wards therein was one-sixth of two-thirds thereof, and no more.

"21st Fact. That the interest of said Alexander P. Massey

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and Charles Massey in said lands was sold as aforesaid with a knowledge on the part of the guardian, Peter Blake, and on the part of the purchaser, Jarvis C. Baker, and of the said appraisers, that James M. Massey died in the year 1857, and their mistake aforesaid, as to the extent of the widow's dower interest, resulted solely from a want of a correct knowledge of the law in force at the time of Massey's death."

Based upon these findings the referee found the following, among others, as a conclusion of law:

"Conclusion 4. That while Peter Blake, the guardian, Jarvis C. Baker, the purchaser, and the appraisers, were all misled as to the extent of the interest of said wards by the want of a proper knowledge of the law, equity will not allow the minors to be prejudiced by such mistake of others."

That the foregoing facts found by the referee are abundantly supported by the evidence can admit of no question. Objection was made to the testimony of Peter Blake, and the testimony of the defendants, as inadmissible under section 3639 of the Code. The objection was overruled, and error is assigned upon this ruling of the court. We do not find it necessary to rule one way or the other upon this question, because, if the referee had excluded the evidence objected to, he could have made no other findings of fact than he did make. There was no conflict in the evidence. The testimony of the appraisers, the recital in the deed and the subsequent acts of J. C. Baker all lead to the inevitable conclusion that all the parties and agencies engaged in transferring the interest of the defendants to Baker mistakenly believed that the widow was entitled to one-third of the real estate in fee. If, then, Jarvis C. Baker bought but one-third of two-thirds, it follows that he paid for no more; and if plaintiffs are entitled to a decree quieting title they will hold the one-ninth of the land, for which the defendants have never received any consideration.

Counsel for appellant insist that the mistake of the parties

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was solely one of law; that all parties connected with the transfer of title knew all the facts, but were mistaken as to their legal effect; and that equity cannot relieve the defendants. They cite *Pierson v. Armstrong*, 1 Iowa, 282; *Shotwell v. Murray*, 1 John. Ch., 512; *Champlain v. Laytin*, 18 Wend., 407; *Gerald v. Elley*, 45 Iowa, 322, and other cases, in support of the rule, and as applicable to the case at bar.

Mistakes in matters of law cannot, in general, be admitted as a ground of relief in equity, but this rule is not of universal application. In Kerr on Fraud and Mistake, p. 398, it is said: "If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired."

Again, on page 399, it is said that "if an agreement be entered into between two parties, in mutual mistake as to their relative and respective rights, either of them is entitled to have it set aside." The author cites numerous authorities in support of the exception to the general rule. An examination of the cases cited will show that they fully support the text. It seems to us, if we concede this to be a question of pure, unmixed, mutual mistake of law, the defendants should be relieved from its consequences, because, by the mistake, the plaintiffs are the apparent owners of that which their ancestor did not purchase nor pay for. Baker agreed to purchase the one-third of two-thirds of the land and no more. This is shown by the recital in the deed. "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either

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as to fact or law, does not fulfil that intention or violates it, equity will correct the mistake so as to produce conformity to the instrument." 1 Story's Equity, § 115.

But it is questionable whether this mistake was one purely of law. It has this element of fact in it: The defendants were the owners of one-third, subject to the widow's dower. It was supposed they only owned one-third of two-thirds. Now, the mistake consisted in an error as to the interest owned by them. It was supposed as a matter of fact that the defendants had no title to the one-third held by the widow. True, this fact may be said to have been based upon a mistake of law as to the extent of the widow's dower, but it is nevertheless a fact, in the same sense that we state a fact proposition when we say that a certain person is the owner of a certain piece of land.

AFFIRMED.

MERRILL V. REAVER.

1. **Railroads: SUBSIDY NOTES.** A note given to aid in the construction of the Albia, Knoxville & Des Moines Railroad provided that it should become due if the road were constructed and the cars running from Albia to Knoxville within two years: *Held*, that it was not a condition precedent to liability on the note that the road should be constructed to Des Moines.
2. ——— : ——— : **CORPORATIONS.** Contracts made by corporations do not embrace as parts and conditions thereof the articles of the corporation.
3. ——— : ——— : ———. A part of the consideration of the note being stock of the company to be issued, an illegal increase thereof would constitute a defense to the note only upon proof that the stock illegally issued could not be distinguished from the legal stock.
4. ——— : ——— : ———. The fact that the affairs of a corporation are unwisely managed, or its contracts not authorized by the articles of incorporation, will not relieve a stockholder from liability to pay his subscription for stock.

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Appeal from Marion Circuit Court.

WEDNESDAY, APRIL 9.

ACTION at law upon two promissory notes. There was a verdict and judgment for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

John F. Lacey, James D. Gamble and D. F. Miller, for appellants.

Stone & Ayres, T. J. Anderson and J. R. Barcroft, for appellee.

BECK, CH. J.—I. The petition declares upon two promissory notes, each in the following language:

“For value received I promise to pay to the Albia, Knoxville & Des Moines Railroad Company, or bearer, the sum of five hundred dollars, upon completion of said railroad and cars running thereon to the depot at Knoxville, Marion county, Iowa, if done in two years from the 1st day of June, 1875, with interest at the rate of ten per cent per annum from maturity. This note to be due and payable when the cars run to the depot above named within the time above stipulated, and on such payment the Albia, Knoxville & Des Moines Railroad Company agree to issue to the maker of this note a certificate of stock for each one hundred dollars mentioned in this note; but if the road be not completed within the time above named the note is to be void, and on demand to be returned to the maker.

“*March 3, 1875.*

JOHN REAVER.”

It is alleged that plaintiff entered into a contract with the Albia, Knoxville & Des Moines Railroad Company to construct its road from Albia to Knoxville, and that upon the performance of his contract, by the completion of the road to Knoxville, the notes in suit, with others of like character, were transferred to him upon his contract in payment. It is also

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averred that the road was completed, as contemplated by the contract, on the 12th day of November, 1875, within the time specified in the notes, and they became due on the day of the completion of the road; and that plaintiff, who purchased the notes from the payee therein named, is ready and willing to deliver to defendant the full amount of stock to which he would be entitled upon the payment of the notes.

The answer of the defendant must be here fully set out, as a demurrer to the amended answer was sustained by the court below. The original answer, not withdrawn, is as follows:

“And for further answer herein the defendant avers and states that at the time the note sued on by plaintiff was executed the capital stock of said corporation was limited by its charter to five hundred thousand dollars, which might be increased to one million dollars by the majority of the stockholders; and that said stock has never been legally increased by said stockholders, but that the contract under which the plaintiff claims to own the notes sued upon purported to increase the capital stock of said corporation to two million one hundred and ninety five thousand dollars, all of which stock was issued and was to be issued to the plaintiff only, and no provisions were made for the issuance of any stock to this defendant, or unto any of the subscribers thereto except to the plaintiff; that by the terms of said contract with said Merrill the said stock was so largely watered or increased as to be wholly valueless; that at the time the note sued on was given the stock of said company was only twenty thousand dollars per mile, but that by said contract the amount was so largely increased as to render it of no value whatever; that it is true that plaintiff has tendered to defendant twice as much of said worthless stock as defendant had subscribed for, or had contracted to receive under the contracts sued on; that at the time of making the contract sued upon the issuance of the stock was one of the considerations for the signing of the said note, and that it was then and there agreed that defendant should have one share

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of stock for every hundred dollars subscribed by him in said note; that it is not true that the stock of said company was increased in any lawful manner at the time alleged in the petition, or at any other time prior to the making of said contract with the said Merrill, but that the said company at the time that said contract was made was only authorized to issue stock to the amount of five hundred thousand dollars, but that in violation of the terms of said charter the said Albia, Knoxville & Des Moines Railroad Company not only contracted with the said Merrill to issue to him the said two million one hundred and ninety-five thousand dollars of stock, but actually issued the same to him, and by said contract gave unto the said Merrill the right to use and the control of the corporate seal of said corporation, and the right to use the name of said company, and the said Merrill thereupon fraudulently obtained the issuance of said stock to himself in fraud of the rights of this defendant; that said stock has been obtained and put in circulation, and is beyond the control of said corporation, and that said stock cannot be distinguished from the genuine and authorized stock of said company, and said Merrill, at the time he made said contract with the said corporation, well knew that said corporation had no lawful right to issue the same, and well knew that said stock was issued in fraud of the rights of the stockholders of the said corporation, and in fraud of the rights of this defendant."

The amended answers are as follows:

"1. Now comes the defendant, and, with leave of the court, amends his answer in the case heretofore filed herein, and for amended answer says he withdraws so much of his answer heretofore filed as admitted that the plaintiff had performed all the conditions and things named on the face of the instrument sued upon to be done and performed by the payee thereof, except so far as the matters and things otherwise in said answer stated constitute a defense. And defendant, for the just protection of his rights in the premises, avers that the notes sued upon were executed to the Albia, Knoxville &

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Des Moines Railroad Company, a corporation organized to build a railroad from Albia, in Monroe county, Iowa, by the way of Knoxville, in Marion county, Iowa, to the city of Des Moines, in Polk county, Iowa, and that it is a condition of each of said notes that it should not be due and payable unless said road should be completed, to-wit: in legal construction, be built from Albia, via Knoxville, to Des Moines city, and the cars running to the depot at Knoxville, within two years from the 1st day of June, A. D. 1875; and defendant denies that said road was completed within the said time prescribed; wherefore, defendant denies plaintiff's right to recover.

"2. And for further answer defendant denies that plaintiff constructed and completed said road from Albia to Des Moines, by way of Knoxville, as said written contracts or notes require, within the time prescribed in said notes, and as is required by the conditions of said notes; and defendant makes the articles of incorporation of said railroad company a part of this answer, a copy of which is hereto annexed marked exhibit 'A,' and he avers that said articles are to be taken and held as a portion of said notes in the construction of said notes; wherefore, defendant denies plaintiff's right to recover, and demands judgment for costs.

"3. And in reference to that averment of plaintiff's petition which states that when the notes sued upon were executed the articles of incorporation of said railroad company limited the amount of stock it might issue to twenty thousand dollars per mile for each mile of its road, and that said articles were amended on or before the 14th day of May, 1875, so as to permit said company to increase its stock to forty thousand dollars per mile, and that stock of said company to the amount of forty thousand dollars per mile has been issued to stockholders, defendant, for answer thereto, denies that there is any clause in said articles of incorporation which limits the amount of stock to any particular amount per mile, and he denies that there is any part of any pretended amendment of

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said articles which specifically authorizes said company to issue stock to the amount of forty thousand dollars per mile; but defendant admits that said company has issued stock to the amount of forty thousand dollars per mile on a portion of said road, to-wit: from Albia to Knoxville, amounting to over one million of dollars in stock; and defendant denies that there was a change duly and legally made in said articles of incorporation to authorize the issuance of said stock last referred to, and he avers said stock was illegally and fraudulently issued as against the rights of defendant, and was the result of a written contract and agreement between plaintiff and said railroad company, of date the 13th day of May, 1875, which will more fully and at large appear by reference to said contract, a copy of which is annexed to division 4 of this answer; and defendant avers that by the provisions of said contract said plaintiff is to build and construct said railroad from Albia, by way of Knoxville, to Des Moines city; and he is to receive from said company as a part of the consideration therefor the further sum of stock to the amount of twenty-five dollars per mile for that portion of said road lying between Knoxville and Des Moines city, making the stock in said company already paid and to be paid to plaintiff amount in all to the sum of two million one hundred and ninety-five thousand dollars; and defendant avers that it was under the provisions of said exhibit 'B' that plaintiff received the said notes sued upon, and it was fraudulent in him to procure said notes when the contract under which he obtained them caused the stock of said company to be watered, and which necessarily depreciated, and did depreciate, the value of any stock to be issued to defendant; and defendant avers that the said watering of the stock of said company was illegal and fraudulent as to defendant; wherefore, defendant denies plaintiff's right to recover, and demands judgment for costs.

"4. Defendant further answering says: That at the time of the execution of the note sued upon the articles of incorporation which are hereto attached and made a part hereof

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limited the capital stock of said corporation to five hundred thousand dollars, and limited the indebtedness of said corporation to five hundred thousand dollars; that under the laws of Iowa said indebtedness could not exceed two-thirds of said capital stock, or three hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-three and one-third cents; that said corporation entered into a written contract with the plaintiff, a copy whereof, marked exhibit 'B,' is hereto attached, by which the said corporation agreed to issue to said plaintiff two million one hundred and ninety-five thousand dollars of stock of said company, all of which was to be issued to said Merrill, and all of which was issued to him; that the articles of incorporation were changed so that the capital stock should be two million one hundred and ninety-five thousand dollars, and the indebtedness might be one million dollars; that said change was illegally made, and not made in the manner provided by said articles, and was fraudulently and wrongfully made for the express purpose of enabling the said Merrill to obtain the said two million one hundred and ninety-five thousand dollars of stock of said corporation; that under the laws of Iowa (Code, § 1061) the indebtedness of a corporation could not exceed two-thirds of said original stock, but that by and through the device of issuing the said illegal and spurious stock, as set forth in the answer and amended answer, the said corporation was enabled to contract indebtedness to the amount of one million dollars; that six hundred and sixty thousand dollars of said indebtedness was and is in the form of negotiable mortgage bonds, which bonds are not yet due, and which have been put upon the market and sold to various persons whose names are unknown to defendant, and that over three hundred thousand dollars thereof are wholly illegal and unauthorized; that all of said bonds were, in pursuance of said agreement, delivered unto plaintiff, and were negotiated and sold by him; that said bonds are now beyond the control of plaintiff, and beyond the control of said corporation, and that said bonds in excess of

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the legal limit of said corporate indebtedness are the same in form of the other bonded indebtedness of said corporation, and cannot be distinguished from the other indebtedness thereof.

"Said bonds have been transferred to innocent holders, and are wholly beyond control and power of the plaintiff or said corporation; that said capital stock was increased and watered illegally, as aforesaid, in order to enable said plaintiff to put said bonds on the market and sell the same; that the bonded indebtedness of said corporation so put upon the market and sold as aforesaid equals or exceeds the total value of all the capital stock of said Albia, Knoxville & Des Moines Railroad Company; that said bonded indebtedness is a lien prior and superior to the rights of said stockholders; and that by virtue of said bonded indebtedness the said stock has been rendered wholly valueless. Wherefore defendant denies plaintiff's right to recover, and demands judgment for costs."

The exhibits referred to in the pleadings need not be set out.

The plaintiff filed a demurrer to each count of the amended answers, which was sustained to the first, second and third, and overruled as to the fourth count.

Thereupon the plaintiff replied to the answer of defendant as follows:

"And now comes the plaintiff, and for reply to the answer filed herein by defendant denies the allegations thereof except as hereinafter stated and admitted. Plaintiff admits that at the time of the execution and delivery of said notes by the defendant to the said Albia, Knoxville & Des Moines Railroad Company the capital stock of said company was limited to the sum of five hundred thousand dollars, but plaintiff avers that afterward, to-wit: on the 24th day of May, A. D. 1875, said company, under and in pursuance of article No. 19 of incorporation of said company, a copy of which is attached to amended answer of defendant, which is hereby made a part hereof, changed the provision limiting the amount of the

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capital stock, and by said change increased the amount of the authorized capital stock of said company to the sum of two million one hundred and ninety-five thousand dollars. A copy of the article as changed is hereto attached and made part hereof, marked exhibit 'B.'

"Plaintiff denies the said contract under which he claims to own the notes sued on purported to increase the capital stock of said company; denies that all of the said stock was issued to plaintiff; denies that said stock was so watered or increased as to be wholly valueless; denies that said company issued the said two million one hundred and ninety-five thousand dollars of stock to plaintiff, or that it gave to said Merrill the use of the corporate seal of said company in manner and form as alleged in said amendment to answer, and denies that he fraudulently or in any manner obtained the issuance of said stock to him; denies that said stock issued under the provisions of said changed article cannot be distinguished from other stock issued or to be issued to the defendant or other parties under the terms of the agreement between said company and said defendant.

"And plaintiff avers there was issued by the said Albia, Knoxville & Des Moines Railroad Company, under the provisions of the said contract between the Albia, Knoxville & Des Moines Railroad Company and plaintiff, to plaintiff, one hundred and sixty shares, and J. M. Walker, trustee for the Chicago, Burlington & Quincy Railroad Company, nine thousand nine hundred shares, and that said stock so issued by said company to plaintiff and the said J. M. Walker, trustee as aforesaid, is all the stock that was issued by said company under the said contract under which the plaintiff claims to hold said notes.

"Plaintiff denies that said stock has been put in circulation beyond the control of said company, and that the same cannot be distinguished from the genuine and authorized stock of said corporation (if the same are not genuine), but avers that each and every share thereof can be identified; that all of

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said stock so issued to the said Samuel Merrill has been, by a written contract with the Albia, Knoxville & Des Moines Railroad Company, cancelled and surrendered to said Albia, Knoxville & Des Moines Railroad Company, and the nine thousand nine hundred shares of stock so issued to the said J. M. Walker as trustee of the Chicago, Burlington & Quincy Railroad Company have been surrendered, cancelled and delivered to the said Albia, Knoxville & Des Moines Railroad Company, and that other four thousand three hundred shares were issued or are to be issued to the said J. M. Walker as said trustee, and are held by him as such trustee.

"And plaintiff says that afterward, to-wit: on the 22d day of February, 1878, the said Albia, Knoxville & Des Moines Railroad Company, by proper proceedings had by said company, changed the articles of incorporation providing for the increase of stock (a copy of which is hereto attached marked exhibit 'B') to the original provision, by which the amount of capital stock of said company is limited to the said sum of five hundred thousand dollars. A copy of the proceedings making said change is hereto annexed, marked exhibit 'D,' and made part hereof.

"And the said Albia, Knoxville & Des Moines Railroad Company and the said plaintiff thereupon changed and modified the said contract under which he claims to own said notes, so that the said plaintiff released the said Albia, Knoxville & Des Moines Railroad Company from any obligation to issue to the plaintiff, under and by virtue of said contract, any stock of said company to an amount which, with the stock issued or to be by said company issued, would be in excess of the sum of five hundred thousand dollars.

"And plaintiff says that the stock so tendered by him to the defendant, and now in court for defendant, was and is valid stock of said company, and was and is distinguishable from any and all other stock issued by said company, whether the same was or is legal or illegal, genuine or invalid.

"And for reply to the fourth division of the amendment to

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the answer plaintiff admits that at the time the notes sued upon were executed the original articles of incorporation limited the capital stock of said corporation to five hundred thousand dollars, and limited the indebtedness of said corporation to five hundred thousand dollars; admits that the statute of Iowa was and is as in said answer alleged; that plaintiff entered into a written contract with defendant as stated in said division of said answer; denies that all of said stock which said corporation in said agreement agreed to issue to said plaintiff was issued to him, and avers that a small portion only thereof, to-wit: the amount of sixteen thousand dollars, was issued to him. Plaintiff says that after the execution of said notes, to-wit: on the 24th day of May, 1875, the board of directors of said Albia, Knoxville & Des Moines Railroad Company being duly convened for that purpose—present, M. Gifford president, J. S. Cunningham vice-president, and the said M. Gifford and J. S. Cunningham, and A. W. Collins, E. Baker, James Mathews, I. A. Bonsell, George Kruck, J. K. Casey, O. B. Ayres, J. M. Jones, S. Heberling and H. J. Scoles, directors of said company, who were a majority of said board of directors, did, on motion of O. B. Ayres, one of said directors, seconded by the said J. S. Cunningham, unanimously vote that article 15 of the articles of incorporation of said company be so amended as to read as follows: 'The capital stock of this company shall be and is hereby fixed at two million one hundred and ninety-five thousand dollars (\$2,195,000), to be divided into shares of one hundred dollars each. The liabilities of the company shall not at any time exceed one million dollars. Each share of stock shall entitle the holder thereof to one vote at all elections by the stockholders. Each stockholder may vote in person or by proxy. That said section so amended shall stand instead and in place of original section 15 of said articles of association.' Which said change in said article 15 of said articles of incorporation was made by the unanimous vote of said members present at said meeting of said board, and by

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and with the unanimous consent of the whole board of directors of said company, expressed in writing and signed by each member of said board of directors, and filed among the records of said company, and entered in the records of the proceedings of said company, and which is as follows :

“ ‘We, the undersigned, being all the members of the board of directors of the Albia, Knoxville & Des Moines Railroad Company, do hereby each of us, as members of said board, consent to and adopt the foregoing amendment and substitute for said article of incorporation of this company, May 24, 1875.’ Signed by each and every member of said board of directors. Plaintiff denies that said company contracted an indebtedness to the amount of one million dollars ; denies that six hundred and sixty thousand dollars of said indebtedness was or is in the form of negotiable mortgage bonds, or that bonds issued to that amount.

“Plaintiff admits and avers that bonds were issued by said company to the amount of fourteen thousand dollars per mile for thirty-three miles of said road, being the first division of said road from Albia to Knoxville, and no more ; denies that said bonds are in the hands of innocent holders, and avers that all of said bonds were issued and delivered to or for the Chicago, Burlington & Quincy Railroad Company, and avers the same have ever since been and are still owned and possessed by said Chicago, Burlington & Quincy Railroad Company, and the said Chicago, Burlington & Quincy Railroad Company purchased the same with full knowledge of the provisions of the original articles of association of said Albia, Knoxville & Des Moines Railroad Company, and of the manner and purposes of the change of said articles of incorporation. And all the changes of said articles of incorporation, and the increase of the stock, and the issuance of said bonds to the amount, and in the manner, and for the purpose for which they were issued, were made and done with the knowledge of the said Chicago, Burlington & Quincy Railroad Company, and in pursuance of an agreement and understanding then

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and therefor had by and between the said plaintiff and the said Albia, Knoxville & Des Moines Railroad Company, and the said Chicago, Burlington & Quincy Railroad Company, that the same should be made and done in every respect as the same were made and done. Plaintiff says that said bonds were not put upon the market, but that the same were delivered to or for the said Chicago, Burlington & Quincy Railroad Company, who has ever since been and now is the owner thereof, under and by virtue of an agreement in writing between the said plaintiff and the said Chicago, Burlington & Quincy Railroad Company; denies that the stock of said Albia, Knoxville & Des Moines Railroad Company has been rendered wholly valueless, or that the same has been in any manner affected by said bonded indebtedness, and plaintiff denies all fraud or illegality in said answer alleged."

Upon the submission of the cause to the jury the court gave the following instructions:

"Gentlemen of the Jury:

"The execution of the written instruments in suit are admitted, and if you find from the evidence that the Albia, Knoxville & Des Moines Railroad was built and completed from Albia to Knoxville, and the cars running thereon to the depot at Knoxville, within two years from the 1st day of June, 1875, then the plaintiff is entitled to recover the full amount named in said instruments, with interest thereon at the rate of ten per cent per annum from the time the road was thus completed to the present time, unless you find that the defendant has maintained his defense of failure of consideration, as hereinafter explained, by a preponderance of testimony.

"2. That is to say, if the defendant has shown that since the execution of the notes in suit the Albia, Knoxville & Des Moines Railroad Company issued a large amount of illegal stock certificates, and which are beyond the control of such corporation or the plaintiff, and that the illegal stock thus issued cannot be distinguished from the genuine stock, and

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that it is now beyond the power of the plaintiff or the railroad company to deliver to defendant valid stock upon his payment of the notes, this would be a good defense.

"3. But the evidence upon this question (whether illegal stock was issued) is mainly record evidence or written evidence, and under the law it is the duty of the court to construe such instruments, and to state the effect of such evidence, and it is the duty of the jury to receive and to accept the instructions so given; and this is so even though you may think the instructions here given are wrong.

"4. Under the articles of incorporation the board of directors had no power to increase the capital stock of the company; at least they had no such power at a meeting of which there had been no notice given, and at which all of the directors were not present. Therefore, if you find that no notice was given of the meeting of directors of May 24, 1875, and all of the directors were not present at such meeting, then their action in attempting to increase the capital stock of the company was invalid, and consequently the stock issued in excess of the original capital stock of the company was illegally issued, and was invalid.

"5. But the illegal issue of stock constitutes no defense to the notes in suit, unless it is further shown that the illegal stock so issued cannot be distinguished from the genuine, and are outstanding; that is to say, unless it is shown by the evidence that the defendant cannot get genuine stock on the payment of the notes.

"6. The issues of fact of which you are to determine in this case are, therefore, very few and simple. If you find from the evidence that the road was built to Knoxville within two years, as hereinbefore explained, and if the illegal stock has been cancelled and destroyed, and the plaintiff is able and willing to deliver genuine stock to the defendant when the defendant shall pay the notes in suit, then the defense has failed, and your verdict must be for the plaintiff. All other

issues that have been discussed in your hearing should be disregarded by you, as they are immaterial to the determination of this suit."

The numerous errors assigned by defendant raise few if any questions except those which are based upon the rulings of the court in sustaining the demurrer and in giving the instructions to the jury. If the principles upon which these rulings are based be correct, the action of the court in the admission of testimony against defendant's objection, and in refusing instructions asked by him, must be supported.

II. We will first consider the action of the court in sustaining the demurrer to defendant's amended answer. The first count of the amended answer is assailed on the ground that it is not a condition of the instrument sued upon that it should not become due until the railroad should be completed to Des Moines, and it is not denied that the road was completed to Knoxville within two years, the time prescribed in the contract.

The first objection raised by the demurrer is well taken. The contract embodied in the notes is for the completion of the railroad to Knoxville within two years, and upon such completion the notes were to become due. The position taken by defendant, as expressed in the first count of the amended answer and urged upon argument, that the payment of the notes is conditioned upon the completion of the road to Des Moines, is in conflict with the express terms of the contract. The point demands no further attention.

III. The second count of the amended answer is bad, for the reason that the notes do not stipulate for the construction of the railroad to Des Moines, as above held, and there is no stipulation in the contract that the articles of incorporation of the railroad company are to be taken as a part of the notes in their construction. The law does not so provide in the absence of stipulation. Surely it cannot be claimed that the charters of corporations are to be

1. RAILROADS:
subsidy notes.

2. —: —:
corporations.

Merrill v. Reaver.

taken as part of contracts made by them. If a contract is beyond the powers of the corporation, as limited by its charter, it may not be enforced; but if within its power we cannot consider the charter as a part of the contract, in order to determine its true construction.

IV. The third count of the defendant's amended answer is bad, for the reason that it does not aver and show that the
3. —: —: stock in excess of the amount which the railroad
— company is authorized to issue cannot be distinguished from legal stock; that it is beyond the control of the railroad company and plaintiff; and that the stock that the defendant will receive under the contract will be invalid and worthless on account of illegal issue. If the stock issued in excess of the amount authorized by the articles of incorporation is illegal—the count of the answer under consideration so avers—and can be distinguished from valid stock which defendant may receive, the issue of the illegal stock cannot depreciate the stock which defendant is to receive as the consideration for his notes. See *Merrill v. Gamble*, 46 Iowa, 615. The demurrer to the third count of the answer was correctly sustained.

V. The doctrine just announced is clearly presented in the second and fifth instructions given to the jury. They are, therefore, correct.

VI. The sixth instruction directs the jury that "if the illegal stock has been cancelled and destroyed, and the plaintiff is able and willing to deliver genuine stock to the defendant when he shall pay the notes in suit, then the defense has failed." This instruction accords with the conclusions above announced, and is correct. It demands no further discussion. There was evidence, to which this instruction is applicable, introduced in support of plaintiff's reply, alleging that the stock issued in excess of the amount authorized by the original articles of incorporation had been cancelled.

VII. The defendant asked the court to direct the jury that

Merrill v. Reaver.

the issue of bonds by the railroad company, in excess of the 4. —: —: amount authorized by the articles of incorporation, which impaired the value of the stock by casting a cloud over the corporate property, would be a good defense against this action. The instruction was properly refused. The bonds, if illegally issued in excess of the amount authorized, are, therefore, void, and the stock of defendant could not be affected thereby. If they are legal, defendant cannot complain. By becoming a debtor to the corporation he is not clothed with the power to control its acts. A corporation may be legally yet so unwisely managed as to impair the value of its stock. Surely this would not relieve the stockholder of liability to pay his subscription to the corporation made for his stock. Men that become stockholders must assume a certain degree of risk that the affairs of the corporation will not always be wisely or even lawfully managed. When contracts are made by the officers of the corporation, which are void, the stockholder's remedy is to be pursued by resistance to the enforcement of such contracts. He cannot withdraw from the corporation. Defendant's rights are the same.

It will be observed that the contract in suit is conditioned for the building of the road within a certain time to Knoxville and the receipt of stock. There is no stipulation for the proper management of the affairs of the corporation.

VIII. Defendant's counsel suggest, though they do not at length argue the point, that the acts of the railroad company rescinded the contract. We discover in the case no support for this position. If plaintiff has performed the conditions of the note he may recover; if not he must fail. It is simply a question of performance of the contract on the part of the holder of the notes.

IX. But defendant argues that, as the over-issue of stock was cancelled after this action was commenced, plaintiff cannot, for that reason, recover. The rights of the parties, it is

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insisted, must be settled as they were when the suit was commenced.

The defense of defendant is that the stock to which he is entitled is depreciated or ruined by the over-issue. He is not entitled to stock until he pays his note. If when he pays there is no over-issue, all the stock in excess of the lawful amount having been cancelled, he will obtain just what his contract provides for, and he is in no manner injured. He was entitled to no stock while there was an over-issue. He was not injured thereby.

X. Defendant insists that the court erred in excluding evidence tending to show that plaintiff is not the true owner of the notes, and that he obtained them through fraud. But the ready answer to this objection is that the ownership and possession of the notes are averred in the petition, and not denied in the answer. His property in and possession of the paper is not in issue, and must be regarded as admitted.

The foregoing discussion disposes of all points presented in argument by counsel of defendant. We find no reasons for disturbing the judgment of the court below. It is, therefore,

AFFIRMED.

SEEVERS, J., having been of counsel in the court below, took no part in the decision of the case.

THE S. C. & I. F. TOWN LOT & LAND CO. v. WILSON ET AL.

1. **Conveyance : CONSIDERATION : ESCROW.** Where a party placed a deed in the hands of another, as an escrow, to be delivered whenever the grantee, a railway company, should erect a depot at a given location, and the company platted the land and paid taxes thereon, but never erected the depot, the road being long afterward constructed and a depot erected by another company, it was *held* the company acquired no title by the deed.
2. ——— : ——— : **ADVERSE POSSESSION.** The platting of the land, and payment of taxes thereon, did not entitle the company to protection by adverse possession.

Appeal from Hamilton Circuit Court.

WEDNESDAY, APRIL 9.

ACTION to quiet title to a certain tract of land in Webster City. Both plaintiff and defendants claim title through one Andrew J. Brewer. The plaintiff alleges that Brewer and his wife executed a deed of the land to the Dubuque & Pacific Railroad Company, and deposited it as an escrow in the hands of one W. C. Wilson. It alleges that Brewer was desirous to secure the location of a depot by the railroad company near the premises in question, and executed the deed in consideration of the advantages to be derived from such location; and that the deed was to be delivered by Wilson to the company upon such location being made. The plaintiff further alleges that the railroad company made the location as contemplated, and thereby became entitled to the deed.

It further alleges that the railroad company conveyed the land by mortgage to A. S. Hewitt and others; that the mortgage was foreclosed, and that the plaintiff holds title through the foreclosure sale. The plaintiff also claims to hold title by adverse possession. The defendants deny the location of the depot as alleged, and deny the conveyance of the land by

The S. C. & I. F. Town Lot & Land Co. v. Wilson.

mortgage, and deny that the plaintiff has acquired title by adverse possession. There was a decree for the defendants. Plaintiff appeals.

I. N. Kidder, for appellant.

Chase & Covil, for appellees.

ADAMS, J.—I. The act of the Dubuque & Pacific Railroad Company relied upon by the plaintiff as constituting the location of the depot consisted in making and filing a plat as an addition to Webster City. Upon this plat certain ground was marked "depot ground." It is insisted that this paper location of depot ground was a location of the depot within the meaning of Brewer's agreement, under which he executed and deposited the deed, and that it is immaterial whether the company ever built a depot upon such ground. The fact is it never did. In our opinion the condition to be performed by the company was not performed, and that it acquired no title to the land.

We ought, perhaps, to observe here that a conditional resolution was passed locating the depot grounds, but that was evidently not such a location of the depot as to entitle the company to a deed, and we do not understand the plaintiff as seriously insisting that it was.

The point more especially relied upon is that a depot was finally built precisely where Brewer had provided in his agreement that it should be built. It is true that it was not built by the Dubuque & Pacific Railroad Company, with whom Brewer's agreement was made, but it was built by a company that claimed to be a successor to the right of that company, both in the railroad and in the land in question. Thirteen years after Brewer's deed was executed and deposited, and after the land in question had passed to the defendants, or a part of them, the Iowa Falls & Sioux City Railroad Company completed the road as far west as Webster City, and built the

The S. C. & I. F. Town Lot & Land Co. v. Wilson.

depot where Brewer provided in his agreement it should be built. The plaintiff claims through that company; but in our opinion that company never succeeded to any rights of the Dubuque & Pacific Railroad Company in the land in question. In the first place we think that the Dubuque & Pacific Railroad Company had no rights which it could convey, and in the second place we think it never attempted to convey any. What right did it have? It not only never performed the condition upon which the deed was to be delivered to it, but it never agreed to perform it. Whatever rights, therefore, it had, they fell short of a transferable interest.

Whether there was an attempt to make a transfer depends upon whether the land in question was embraced in a certain mortgage. The property conveyed was described as "roadway, stations, depot land, and other land appurtenant to the railroad;" but there was expressly reserved "all lands not included in the grant of public lands, and not necessary for the uses and purposes of the railroad, and the depots and the right of way." We think that the land in question did not come within the general terms of the grant, and would not have passed even if there had been no reservation. The evidence shows that the land was laid out into town lots, and held for town purposes and not railroad purposes.

II. The Dubuque & Pacific Railroad Company platted the land in controversy, in connection with other land, in 1859.

2. —: —: At that time the company entered upon the land and staked off the lots. The plaintiff claims that the company thereby took possession. After that it does not appear that the company or any person claiming under it occupied the property or exercised any acts of ownership over it. The plaintiff and those under whom it claims paid taxes on the property for several years. The plaintiff's claim of adverse possession rests upon such payment. To this it may be said that the property had been assessed as lots, notwithstanding the platting was done by a company who had no right to plat it, and the taxes had been paid upon the prop-

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erty as lots. But, disregarding the fact that the platting was unauthorized and the assessment irregular, we think that the plaintiff can derive no advantage from the payment of taxes. The only act of occupancy was the staking off the lots. But that was done by the Dubuque & Pacific Railroad Company, and that company, as we have seen, never undertook to convey its interest or supposed interest in the property. The plaintiff, therefore, does not connect itself with any adverse possession. The payment of taxes is mere evidence of a claim and its extent. It is not of itself adverse possession.

We think that the judgment of the Circuit Court must be

AFFIRMED.

THE FIRST NATIONAL BANK OF LEON v. GILL & Co. ET AL.

1. **Practice: SETTLEMENT: INTERVENTION.** Where an action had been settled by the parties, and a petition of intervention afterward filed, but no notice of the filing of the petition was served upon the plaintiff until after the court had marked the case as settled, it was *held* that a motion to strike the petition of intervention should have been sustained.
2. ———: **INTERMEDIATE ORDER: APPEAL.** An appeal will lie from an order of the court refusing to strike a petition from the file.

Appeal from Decatur District Court.

WEDNESDAY, APRIL 9.

THIS action was commenced against the defendants A. Gill & Co. upon two promissory notes, for one hundred and forty-two dollars and eight cents each. An attachment was issued, and on the 12th day of May, 1876, was duly levied upon a stock of goods which the return states is the property of A. Gill & Co., in the possession of A. Gill. The writ of attachment, with the return thereon, and an invoice of the goods levied upon attached, was filed in the office of the clerk of the court

50	425
81	425
50	425
98	186
50	425
115	23
115	27

The First National Bank of Leon v. Gill & Co.

May 19, 1876. The following statement is indorsed upon the invoice of goods attached to the writ of attachment:

"We hereby sell the goods described in this invoice to the plaintiff, they agreeing to take the same in full settlement of their claim against A. Gill and A. Gill & Co., this 20th day of May, 1876.

"J. H. SUMMERS.

"A. GILL.

"A. GILL & Co.

"J. W. HARVEY,

"Attorney for Plaintiff."

On the 30th day of May, 1876, court not being in session, Childs & Co. filed their petition of intervention as follows:

"The petitioners, Childs & Co., state that on or about the — day of February, 1876, the defendants herein were indebted to them in the sum of six hundred and twenty dollars, and that they sued out an attachment against the defendants, and attached, as garnishee, one J. H. Summers, who held in his hands, subject to petitioner's claim, a large amount of personal property belonging to the defendants A. Gill & Co. and A. Gill; that after said garnishment the plaintiff herein procured an attachment against the property of defendants, and levied upon and took from said Summers the property held by him and belonging to A. Gill & Co. and A. Gill; that the petitioners' claim against said Gill & Co. and A. Gill is still unsatisfied. Petitioners, therefore, ask that they have the property attached in this cause, or that they have judgment against the plaintiff herein for the value of the same and their costs in this cause." This petition is not under oath. On the 7th day of August, 1876, the cause was marked settled by the court. On the 10th day of August, 1876, the intervenors caused to be served upon plaintiff a notice of the filing of the petition of intervention, requiring plaintiff to appear and defend thereto before noon of the second day of the next term of court, commencing January 15, 1877.

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On the 18th day of January, 1877, the plaintiff filed a motion to strike the petition of intervention from the files, because said petition is not verified as required by law, and the cause has been settled between plaintiff and defendant, and dismissed and marked settled by the court, and there is nothing pending between plaintiff and defendants.

The court overruled the motion and ordered that the cause stand as an original cause, to which the plaintiff excepted. The plaintiff refusing to plead, and standing upon its motion, the court ordered that a default be entered against the plaintiff, for want of an answer to the petition of intervention, to which the plaintiff excepted. The plaintiff appeals.

John W. Harvey, for appellant.

W. H. Robb, for appellees.

DAY, J.—The agreement of settlement indorsed upon the invoice attached to the writ of attachment and on file with the case bears date May 20, 1876. In the absence of any showing to the contrary the presumption is that it was executed on the day it bears date. The petition of intervention was filed in vacation on the 30th day of May, 1876. The parties having agreed upon a settlement the plaintiff was not required to take notice of the paper so filed until notice of the filing was served upon it. Notice was not served until August 10, 1876. Prior to that time, on the 7th day of August, the cause was marked settled by the court. When the plaintiff acquired notice of the filing of the petition of intervention, no cause was pending between the plaintiff and the defendants. The facts of this case bring it fully within the principle of *Henry, Lee & Co. v. The Cass County Mill & Elevator Company*, 42 Iowa, 33. In fact this is a stronger case for appellant than that, for in that case the defendants had knowledge of the filing of the petition of intervention before any judgment was rendered upon the agreement of settlement, and the defendants moved for such judgment at the

The First National Bank of Leon v. Gill & Co.

same time that they moved to strike the petition of intervention from the files.

If the intervenors have rights which require protection they should commence an original action in the ordinary way for that purpose. After the overruling of the motion to strike the petition of intervention from the files the court ordered that the cause stand as an original cause. It was not competent for the court thus, by mere order, to transform proceedings by intervention into original proceedings. The petition is drafted as a petition in intervention, and the notice advises plaintiff that a petition of intervention has been filed. It may be that the intervenors might, by proper amendment, have transformed their petition into an original proceeding, but they did not offer to do this. The motion to strike the petition of intervention from the files should have been sustained.

II. It is claimed that no appeal can be taken from the order in question. Section 3164 of the Code authorizes an
 2. ——— : in- appeal from “an intermediate order involving the
 intermediate or- merits, and materially affecting the final decis-
 der : appeal. ion.” The intervenors, by the filing of the petition of inter-
 vention, assert the right to become parties to an action between the plaintiff and the defendants, and they demand that in that manner certain rights which they claim to possess shall be determined and enforced. The plaintiff, by its motion to strike the petition of intervention from the files, in effect says the controversy between plaintiff and the defendants has been determined, and, therefore, you have no right to intervene. It is apparent that a decision of this question either way does involve the merits of the controversy between these parties, and materially affect the final decision respecting it. If the court had sustained the motion to strike the petition of intervention from the files, can it be doubted that the intervenors would have had the right of appeal. The right must be reciprocal. In *Henry, Lee & Co. v. The Cass County Mill & Elevator Company*, an appeal was enter-

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tained from such an order as the one in this case. It must be remarked, however, that in that case the appellee made no question as to the right of appeal.

III. It is claimed by appellee that there is no evidence in the abstract that an appeal has been taken because the notice of appeal and service thereof are not abstracted. The abstract contains the following: "Appeal notice served July 3, 1878." In the absence of amended abstract showing defect in notice or service this statement is sufficient to show that an appeal was taken. The appellant, however, filed an amended abstract, setting out in full the notice of appeal, with service thereof on the attorney of the intervenor and on the clerk of the District Court, thus answering fully this objection of the appellee.

The judgment is

REVERSED.

 PALMER V. ALBEE.

1. **Evidence:** PATENT AMBIGUITY. Where, by the terms of a contract of subscription, a party undertook to give for the purpose of the subscription "twenty acres of land," it was *held* that the uncertainty of description, or ambiguity, could not be rendered certain or explained by parol. BECK, Ch. J., *dissenting*.

50	429
93	118
50	429
117	572

Appeal from Floyd District Court.

WEDNESDAY, APRIL 9.

THIS action is founded upon a written instrument, of which the following is a copy:

"CHARLES CITY, IOWA, June 18, 1872.

"We, the undersigned, do hereby agree to pay to Dr. William Palmer, chairman of the building committee of the First Baptist Church, of Charles City, Iowa, the sum set opposite our respective names, for the purpose of liquidating the debt on said church; and if the whole amount is not raised to pay

It is alleged that the whole amount necessary to pay the debt was raised by subscription before the day of the dedication of the church; that said land was reasonably worth fifteen dollars per acre, and defendant has failed and refused to convey the same to the plaintiff; that at the time of signing said subscription defendant verbally stated to plaintiff that the said land was situated near the farm of E. M. Clark, about three miles north of Charles City, Iowa. It is further averred that the land subscribed was twenty acres of the north-west quarter of the south-west quarter of section 19, township 96, range 15 west, in said Floyd county, and was at said time of the value of fifteen dollars per acre; and that defendant has sold and conveyed said land to other parties. Judgment is prayed for three hundred dollars and costs.

J. S. Root, for appellee.

“The first (*ambiguitas latens*) occurs where the deed or instrument is sufficiently certain and free from ambiguity, but

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the ambiguity is produced by something extrinsic or some collateral matter out of the instrument; for example, if a man devise property to his cousin, A. B., and he has two cousins of that name, in such case parol evidence will be received to explain the ambiguity."

"The second or patent ambiguity occurs where a clause in a deed, will or other instrument is so defectively expressed that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party. In such case evidence of the declaration of the party cannot be admitted to explain his intention, and the clause will be void for uncertainty." 1 Bouvier's Law Dictionary (5th Ed.), 97.

In the light of these definitions there is no difficulty in determining that the ambiguity in the instrument upon which this suit is brought is *patent*. It appears at once upon reading the subscription, and arises not so much from imperfection of description as from an absence of description. It is true the terms of the subscription may possibly suggest that the subscriber was to select twenty acres of land, but as this is not the construction claimed by the plaintiff, who sues for the value of a certain twenty acres, which he seeks to show by parol evidence was the twenty acres intended, we are confined to the inquiry whether the description of the land can be thus shown.

With reference to the admissibility of parol evidence in such cases Sugden makes use of the following language: "But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would be in effect to pass without deed what by the law can be passed by deed alone. Of this Bacon observes infinite cases might be put, for it holdeth generally that all ambiguity of words by the *matter within* the deed, and not out of the deed, shall be helped by construction, or in some cases by election, but never by averment; but rather

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shall make the deed void for uncertainty." 1 Sugden on Vendors, 175.

The same doctrine, quoting the same authority, is found in 1 Greenleaf on Evidence, § 297. The same principle applies in this case. If the description can be supplied by parol evidence, why cannot any other material part of the written instrument be supplied in the same way? And if this can be done then the whole instrument can be set aside, and parol evidence substituted therefor. It is true that descriptions are sometimes explained by parol, but only in the following cases: *First*, where the description is clear, but more than one subject or more than one person answers to the description; *second*, where the description is true in part, but untrue as to the balance. Where the ambiguity, as in the case at bar, arises upon the face of the instrument, it can only be helped, if helped at all, by the rules of construction, and "construction is the act of discovering the thoughts which are expressed in words of writing, or it is the most probable explanation of what appears obscure and ambiguous." 1 Bouvier's Institutes, § 658.

If the contract is in a language not understood by the court it must be interpreted; or if some of the words have various meanings or peculiar technical applications not known to the court, then the circumstances under which the instrument was made may be shown—not for the purpose of adding to or changing the instrument, but for the purpose of determining in what sense the parties intended to use the words actually used. "In other words and more generally, if the court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with a full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument, then it is a case of incurable, hopeless uncertainty, and the instrument is, therefore, so far inoperative and void." 1 Greenleaf on Evidence, § 300.

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It is to be observed, also, that while the circumstances in which a party was placed and the situation of both parties may be shown the language of the parties is excluded. 1 Greenleaf on Evidence, § 297. "If the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void." *Boardman v. The Lessees of Reed*, 6 Peters (U. S.), 328.

In view of a class of cases where courts have admitted parol evidence of extrinsic matters for the purpose of determining the intended sense of words of doubtful or equivocal meaning, it has been questioned whether it is proper to say that a patent ambiguity is never susceptible of explanation by parol. The case of a written contract assigning a party's interest in the *freight* of a ship is given as an example of this class; parol evidence of the circumstances of the transaction being admissible to ascertain whether the word "freight" referred to the goods on board, or an interest in the earnings of the ship. See 1 Phillipps on Evidence, 1858, note 988, by Cowen & Hill. As to whether such cases may or may not, under the above definition of the two classes of ambiguities, be fairly considered cases of latent ambiguity, it is unnecessary to determine, as the case at bar is not one of that character.

From the authorities we have been able to examine three rules may be taken to be correct: *First*. Where the instrument itself seems to be clear and certain on its face, and the ambiguity arises from some extrinsic or collateral matter, the ambiguity may be helped by parol evidence. *Second*. Where the ambiguity consists in the use of equivocal words designating the person or subject-matter, parol evidence of collateral or extrinsic matters may be introduced for the purpose of aiding the court in arriving at the meaning of the language used. *Third*. Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is

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meant, the rule is inflexible that parol evidence cannot be admitted to supply the deficiency. About this last-named class of cases there cannot, under the authorities, be any question. They belong to the *ambiguitas patens* of Lord Bacon.

In the case at bar the ambiguity is patent, and no interpretation or explanation of the words actually used could possibly help the ambiguity, or make the description complete or certain. Something must be added, before a description exists on the face of the instrument, and in the light of the foregoing discussion the omission cannot be supplied by parol evidence.

The ruling of the District Court on the demurrer must, therefore, be

AFFIRMED.

BECK, CH. J., *dissenting*.—I. It will be observed that the action in this case is brought upon the contract executed by defendant, which obligates him to contribute twenty acres of land toward the liquidation of the debt of the church. The conditions of the contract to be performed by the church have been fulfilled. The consideration upon which defendant's promise is based has passed from the plaintiff. There is no question raised by the demurrer upon these points. The case as presented by the pleadings is this: The defendant, for a sufficient consideration, which has passed, promised to contribute (*pay*) to plaintiff "twenty acres of land," without a more particular description of the property. The demurrer sets up the defense that the contract is so indefinite that the law will not enforce it. The indefiniteness pertains to the description of the land, or, rather, the want of description. The point decided in the foregoing opinion of the majority is that for this indefiniteness the contract will not be enforced.

In my opinion parol evidence is always admissible to apply a written contract to its subject. If the language of the contract does not with sufficient explicitness describe the subject it may be identified by parol evidence.

Suppose A., in consideration of three hundred dollars paid

Palmer v. Albee.

him, agrees to deliver (*pay*) to B. twenty head of cattle, will it be seriously claimed that B. cannot maintain an action on the contract because of the indefiniteness or want of description of the cattle? Surely not. The law will permit him by parol evidence to apply A.'s promise to the subject contemplated. The contract is regarded as partly in writing and partly in parol, and oral evidence, from the necessity of the case, is admissible to establish that part of the agreement which rests in parol.

These rules are familiar, and of constant application. The case supposed is the precise case before us. Neither law nor chancery will send a party away without affording him a remedy upon a contract of this kind. Each will ascertain the true intention of the parties by evidence which will apply the contract to its subject.

No question arises in this case in regard to notice to other parties. If the instrument is required by law to impart notice to third persons, the description of the subject should be sufficient to direct the mind to evidence whereby the subject could be identified. *Smith & Co. v. McLean*, 24 Iowa, 322. But no question of notice arises in this case.

II. In my opinion the doctrine of ambiguities has no application to this case. There is no ambiguity in the instrument as to its terms; the obligations of the parties are clearly expressed. The subject-matter of the contract to which the obligation of defendant is to be applied is not specifically described. This is not the ambiguity to which the rules of evidence announced in the opinion of my brothers apply, and forbid the introduction of oral evidence to discover the true intention of the parties.

I can better express the doctrine of the law, which I insist is applicable to this case, by using the language of a learned writer, than by words of my own. Mr. Chitty says: "Where the terms of the written instrument are clear, and oral evidence is used to point the *application* to this or that *subject*-

 Parkyn v. Travis.

matter, the oral evidence does not usurp the authority of the written instrument. It is the instrument which operates. The oral evidence does no more than assist its operation by pointing out and connecting it with the proper subject-matter. It acts in aid and assistance of the written instrument, and performs that duty which, on every application of a written instrument, must be accomplished by means of extrinsic evidence; that is, it points out the precise object to which the instrument is applicable." Chitty's Contracts, 104.

The views I have expressed are, I think, in accord with the authorities which are extensively referred to and discussed in 2 Cowen & Hill, and Edwards' Notes on Phillipps on Evidence, 751, *et seq.*, and 761, *et seq.*

In my opinion the judgment of the District Court sustaining defendant's demurrer to plaintiff's petition is erroneous, and ought to be

REVERSED.

PARKYN V. TRAVIS ET UX.

1. **Practice:** COMMENCEMENT OF ACTION. An action is commenced when the notice is served upon the defendant, and not when it is placed in the hands of the officer for service.
2. **Pleading:** DEMURRER. Where, in an action to foreclose a mortgage, it was averred in the petition that upon default in payment of one of the notes the plaintiff elected that the whole sum secured by the mortgage should become due, it was *held* the averment was not assailable by demurrer.

Appeal from Linn Circuit Court.

WEDNESDAY, APRIL 9.

Action in equity to foreclose a mortgage which was given to secure two promissory notes. Said notes were executed on the 28th day of February, 1877—one due in five years

50	436
103	223

50	436
121	681
121	683
121	686

50	436
136	152

Parkyn v. Travis.

and the other due in ten years after date, payable to the order of plaintiff, with interest payable annually, at the rate of nine per cent per annum. Each of said notes contains a stipulation in these words: "And if the principal or interest of any of this series of notes remains due thirty days, then the whole series, at the option of the holders, shall become immediately due and payable."

The mortgage given to secure the payment of the notes contains the following stipulations: "And it is stipulated and agreed that in the event of failure to pay any of said money, either principal or interest, within thirty days after the same becomes due, or a failure to perform or comply with any of the foregoing conditions or agreements, the whole sum of money herein secured shall become due and collectible at the option of the holder, and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest and costs."

On the 1st day of April, 1878, the plaintiff delivered an original notice to the sheriff, which was served on the defendants on the 3d day of the same month. Said notice stated the petition would be filed on or before May 22, 1878, and also a clause in these words: "The said plaintiff having elected that the whole sum of money secured by the said notes and mortgage be now due and collectible."

The petition was filed on the 21st day of May, 1878. It contains this averment: "More than thirty days have elapsed since the interest on both of the said notes became due and payable, the said interest being due and payable on the 28th day of February, 1878, to-wit: the sum of three hundred and fifteen dollars; that plaintiff has elected and does elect that the whole sum of money secured by the said notes and mortgage be due and payable; that the sum of three thousand five hundred dollars, with interest thereon at the rate of nine per cent per annum, from February 28, 1877, and interest at the rate of nine per cent per annum on three hundred and

Parkyn v. Travis.

fifteen dollars, from February 28, 1878, is now due on the said notes and mortgage."

The defendants demurred to the petition, on the ground that the facts therein stated did not entitle the plaintiff to the relief demanded.

The demurrer was overruled. The defendants failed to plead further, and judgment and decree of foreclosure were rendered for the plaintiff. Defendants appeal.

Blake & Hormel, for appellants.

I. N. Whittam, for appellee.

ROTHROCK, J.—I. It is urged by counsel for appellant that the action was commenced on the 1st day of April, 1878, 1. PRACTICE: when the original notice was delivered to the commencement of action. sheriff, and there was no default in the payment of interest until thirty days from February 28th, and three days of grace, which would not terminate till April 2d.

Conceding that, under the peculiar language contained in the notes and mortgage in this case, the defendants were entitled to days of grace in the payment of interest—a point which we do not determine—still we think the action was not prematurely commenced. Section 2532 of the Code provides that the delivery of the original notice to the sheriff, with intent that it be served immediately, is a commencement of the action. This time is evidently fixed for the purpose of determining the rights of the parties under the statute of limitations. Section 2599 contains the general provision as to what is the commencement of an action. It provides that "actions shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney," etc. The notice in this action was served April 3, 1878. This would be after the expiration of the days of grace, if defendants were entitled to that time.

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II. It is next urged that a notice of election should have been given before suit to foreclose for the whole amount can be maintained. Whether such notice was necessary we need not determine. It is sufficient to say that it is averred in the petition that plaintiff had elected that the whole sum secured by the mortgage should be due. If an election were necessary this averment might have been vulnerable to a motion for a more specific statement, requiring plaintiff to set out particularly how he had made such election, or the averment of an election might have been denied by answer. But a demurrer will not lie for this reason.

III. The notes and mortgage provided that defendants would pay a reasonable attorney's fee if collected by an attorney. Complaint is made that the fee allowed is unreasonable. The record before us does not disclose upon what evidence the court made the allowance of the fee. In the absence of an affirmative showing that the fee allowed was unreasonable, we must presume that the finding of the court was correct.

AFFIRMED.

THE COUNTY OF CERRO GORDO V. THE COUNTY OF WRIGHT.

1. **Settlement: RESIDENCE.** The residence in a county necessary to establish a settlement therein must be personal presence in a fixed and permanent abode, or of a character indicating permanency of occupation, as distinct from lodging, boarding, or temporary occupation.
2. ———: ———: **BOARD OF SUPERVISORS.** Before an action can be maintained against a county upon an unliquidated claim, the same must have been presented to the board of supervisors, and payment refused by them.
3. ———: **NOTICE.** Where a person having a legal settlement in one county becomes sick and disabled in another, a notice by the auditor of the latter to the auditor of the former that relief is being furnished, is sufficient to charge the county in which the pauper has a settlement.

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Appeal from Franklin District Court.

WEDNESDAY, APRIL 9.

ACTION for the recovery of certain sums of money which it is alleged were expended by plaintiff in the support and medical attendance of a pauper who, it is alleged, had a legal settlement in Wright county at the time such support and medical attendance were furnished. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

N. F. Weber and Miracle & Kamrar, for appellant.

F. M. Goodykoontz and King & Henley, for appellee.

ROTHROCK, J.—I. The pauper to whom the aid was furnished by the plaintiff was a woman, named Hattie May Bennett. She came from Illinois to Wright county in December, 1874, and remained there until March, 1876, when she went to Cerro Gordo county. Shortly afterward she was taken sick, and the support for which this action was brought was furnished during the summer of 1876. One of the principal points in controversy upon the trial was whether the pauper had a legal settlement in Wright county before her removal to the county of Cerro Gordo. Upon this question the defendant asked the court to instruct the jury as follows:

“Mere lapse of time, without more, will not establish the settlement of a poor person in a county, but the removal to a county must have been *bona fide*, and with the intention of becoming a citizen and gaining a settlement in such county; and unless you find from the evidence that the said Hattie May Bennett removed to Wright county with the purpose and intention of gaining a residence and settlement in the county, you will find for the defendant, even though you find that she had a residence in the county for more than one year.”

1. SETTLE-
MENT: resi-
dence.

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This instruction was refused, and the following instruction was given :

"4. The first question for the jury to determine is, did the pauper Hattie May Bennett have a settlement in Wright county at the time the alleged relief was given? In order to constitute a settlement in Wright county of the alleged pauper, Hattie May Bennett, the jury must find from the evidence that she had resided in Wright county one year or more prior to her locating in or going to Cerro Gordo county."

We think the instruction asked was properly refused, because, although the pauper may not have intended at the time of her removal to Wright county to become a resident of that county, yet she may have after her removal, and more than a year before she went into Cerro Gordo county, made her home in Wright county, in such way as to have gained a legal settlement. If her living in that county for one year before she left it was in such manner as to evince an intention to make her home there, she was a resident, notwithstanding she may have come from Illinois as a visitor or sojourner.

The court gave no other instruction upon the subject of residence aside from that above quoted, and while it may be correct as an abstract proposition of law, yet by failing to explain to the jury what constituted a residence we think they were left to grope their way in the dark in considering that question. There was evidence introduced upon that branch of the case which demanded consideration. It was shown that when Hattie May Bennett came to Wright county from Illinois she avowed an intention only to make a visit to her friends and relatives, and one or two of her relatives testified that she never in their hearing declared her intention to be otherwise. On the other hand it was shown that while she remained in Wright county she went to school and worked out as a servant girl, and that she remained there some fifteen months, and only went into Cerro Gordo county because she had an opportunity to obtain work there. Under these cir-

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cumstances it was highly proper that the court should have defined the character of inhabitancy which constitutes residence. It is true the Code (§ 1352) provides that persons residing in the State one year, without being married, gain a settlement in the county of their residence; but what constitutes residence is not defined by statute. It should have been defined to the jury as "personal presence in a fixed and permanent abode" (20 Johnson, N. Y., 208; 1 Metcalf, Mass., 251), or that it indicates permanency of occupation as distinct from lodging, or boarding, or temporary occupation. 19 Maine, 293; 2 Kent's Com., 576. That such is its significance in this State see *Hinds v. Hinds*, 1 Iowa, 36.

II. The defendant further requested the court to instruct the jury as follows, which instruction was refused:

"4. Under our statute before any action can be brought against any county upon an unliquidated demand the same
2. —: —: must have been presented to the board of super-
board of su- visors of such county and payment demanded.
pervisors.
In the case at bar the claim is an unliquidated claim, and, there being no evidence showing or tending to show that the claim was presented to the board of supervisors of the county of Wright before the commencement of this suit and payment demanded, you are directed to return a verdict for the defendant."

This instruction should have been given. A careful examination of the abstract fails to disclose any evidence whatever that the demand was ever presented to the board of supervisors of Wright county and payment demanded, as required by section 2610 of the Code. That the claim was unliquidated—that is, not settled and not adjusted—admits of no question. Counsel for appellee insists that there was evidence tending to show that the claim was presented to the board of supervisors, and payment demanded, and refers to certain letters which were written by the auditors of the respective counties to each other. These letters were written before the demand had all accrued; at least, long before the accounts

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were audited and paid by Cerro Gordo county. They were only intended as giving the notice required by section 1357 of the Code.

III. It is urged that there was no evidence that the plaintiff, within a reasonable time after the county of the settlement was ascertained, gave the defendant notice
 3. — : notice. of relief being furnished, so as to charge the county, as provided in section 1357 of the Code. An instruction to this effect was asked, which was refused. An examination of the evidence satisfies us this action of the court was correct. It was shown that the auditor of Cerro Gordo county gave the proper notice to the auditor of Wright county that the relief was being furnished. This, we think, was sufficient. It surely cannot be claimed, where a person having a legal settlement in one county becomes sick and disabled in another, that it is necessary to convene the boards of supervisors of both counties in order that notice may be given so that the proper county may be charged with the aid furnished.

For the errors above pointed out the judgment of the court below is reversed, and the cause remanded.

REVERSED.

THE STATE V. MOODY.

1. **Criminal Law: LARCENY: EVIDENCE.** Facts considered which were held sufficient to sustain a conviction for breaking and entering a building in the night-time.
2. — : — : **SENTENCE.** Where the defendant was not an old offender, the property taken of small value, and the building entered a store, it was *held* that a sentence of eight years should be reduced to two years.

Appeal from Clayton District Court.

WEDNESDAY, APRIL 9.

THE defendant was tried, convicted and sentenced to imprisonment in the penitentiary for the term of eight years, for

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the crime of breaking into a store in the night-time with intent to steal therefrom. He appeals to this court for a reversal of the judgment against him.

L. O. Hatch, for appellant.

J. F. McJunkin, Attorney General, for the State.

ROTHROCK, J.—I. The alleged crime consisted in breaking the store of Isaac Mathews, at McGregor, and stealing therefrom some articles, such as knives, forks and spoons, of the value of thirty-six dollars. The store was entered by raising a back window.

It is conceded that the crime was committed by some one, and the only question presented by counsel for appellant is that the evidence was insufficient to warrant the conviction of the defendant.

The Attorney General moves to strike from the abstract and transcript what purports to be the evidence, because there is no bill of exceptions embodying the evidence, and because the evidence does not appear to have been certified by the trial judge, as provided in section 4636 of the Code. This motion seems to be well taken, but, whether so or not, a careful examination of the abstract has led us to the conclusion that the verdict of the jury finds support in the evidence presented to us.

The defendant is a young man, and at the time the alleged crime was committed resided with his father on a farm some distance from McGregor. He was in the city on the evening before the crime was committed, and was seen near a show-window in front of Mathews' store, where most of the goods which were afterward stolen were kept in plain view. He remained in the city until late at night. The crime was committed on Saturday night. On Sunday afternoon the defendant was seen going into a brush thicket on or near his father's farm. Search was made in the thicket, and the parties searching first discovered a place where they sup-

1. CRIMINAL
law : larceny :
evidence.

The State v. Moody.

posed, from the disturbed condition of the leaves upon the ground, something had been concealed. There were fresh tracks leading from the place, which were traced to a large tree, in the hollow trunk of which the goods were found. It is not certain from the evidence how near the defendant was seen to the place where the witnesses supposed something had been concealed, or to the tree where the goods were found. He was, however, within a few rods when he disappeared from the view of those who were watching him.

The defendant was arrested at his father's house on Monday morning after the crime was committed. One of the officers who made the arrest testified as follows: "We arrested defendant Monday morning, about 4 o'clock, at his father's house. I first saw him sliding from the shed roof on to which a window opens from the main building. I told him we wanted him and had a warrant for him, but did not tell him what we had the warrant for. He jumped and ran, and I shot at him. I ran after him and was about shooting the third time, and he halted and I took him."

We would not be justified in setting aside the verdict upon this evidence. The attempt to escape is clearly shown. It is argued that this may have occurred by reason of fear rather than a sense of guilt. That we cannot determine. It was a question for the jury, taking the attempt to escape into consideration with the other evidence in the case, and we are not prepared to say that undue weight was given to the act of the defendant in going into the thicket near where the goods were afterward found. The jury may have been satisfied, and properly so, from all the evidence that the defendant was the person who concealed the goods in the place where they were found.

II. It is urged that the punishment inflicted is excessive.

Taking into consideration the amount in value of the goods which were taken, the kind of goods, and the manner in which the store was entered, and the fact that there is nothing in the record showing that defendant is an old offender, we think the claim made is well

Harlan v. Porter.

founded. The maximum punishment for the crime is ten years' imprisonment in the penitentiary. The minimum is a fine not exceeding one hundred dollars and imprisonment in the county jail not exceeding one year. These are the two extremes of punishment. We are of opinion that imprisonment in the penitentiary for the period of two years is ample punishment in this case, and the judgment will be thus modified.

MODIFIED AND AFFIRMED.

HARLAN V. PORTER ET AL.

1. **Practice:** TRIAL UPON WRITTEN EVIDENCE. Where a case has been set down for trial upon written evidence, in pursuance of section 2742 of the Code, oral testimony is not admissible.

Appeal from Keokuk District Court.

WEDNESDAY, APRIL 9.

ACTION in chancery to quiet the title to land described in the petition. There was a decree granting relief sought for in a cross-bill filed by one of the defendants. Plaintiff appeals. The facts of the case appear in the opinion.

C. G. Johnson and McJunkin, Henderson & Jones, for appellant.

Woodin & McJunkin, for appellees.

BECK, CH. J.—The petition of plaintiff, praying that his title to the land therein described be quieted, was filed July 6, 1875. Porter was made the sole defendant, and in April, 1876, filed an answer and cross-bill asking that the title be quieted in himself.

On the 15th of April, 1876, plaintiff filed an amended

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petition, making W. D. Merriam and others defendants. On the same day these defendants appeared, and the cause was set down by agreement for trial upon written evidence. December 4, 1876, Merriam filed a cross-bill praying that the title be quieted in him. It appears, from the abstract of title attached to his cross-bill, that he acquired title to the land by a conveyance executed by Porter after the petition of plaintiff was filed. On the same day the defendants other than Porter and Merriam disclaimed all interest in the land. On the 6th day of December, 1876, plaintiff dismissed his petition and amended petition, and filed an answer to Merriam's amended petition, and avers that he is the owner and in possession of the land.

The second count of the answer alleges that after the execution of the tax deed, under which Merriam claims title, plaintiff entered into a parol contract with the holder of the title under the tax deed to purchase that title; that plaintiff has been in possession of the land, and at all times ready to make payment therefor as stipulated in the contract, and that of these things Merriam has at all times had full notice.

Another count charges a fraudulent combination at the tax sale, whereby competition was prevented, to which Merriam was a party.

Upon filing this answer plaintiff moved the court to transfer the cause to the law docket, to be tried by a jury, on the ground that the issues were at law and not in equity. The motion was overruled. Upon the trial plaintiff sought to introduce oral testimony, which was refused. These rulings of the court are assigned for error, and present the only questions raised in the case.

II. The motion to transfer the case to the law side of the court was correctly overruled, for these reasons: After the dismissal of plaintiff's petition the case stood
1. PRACTICE: trial upon
written evi-
dence. upon Merriam's cross-bill, and plaintiff's answer thereto. The cross-bill sought to quiet defendants' title to the land as against plaintiff's claim. The case

 Collins v. Lucas County.

made and the relief sought were clearly of equitable cognizance. The defense pleaded by plaintiff in the second count of his answer to the cross-bill, namely, an oral contract for the purchase of the land, which was known to Merriam, was a purely equitable defense. It could not have been urged had the case been tried at law.

The case was clearly of equity jurisdiction, and the court correctly overruled the motion to transfer it to the law docket.

III. The court, at the term when Merriam was first required to appear, and upon his appearance, ordered the cause to be tried upon written evidence. This order was properly made pursuant to Code, § 2742. The plaintiff, therefore, could not present oral testimony upon the trial, and the court correctly so ruled.

The plaintiff's argument, based upon his right to a jury trial, is sufficiently answered by the consideration that the case was in equity, to be tried as all issues are triable in that forum.

No other questions are presented in this case.

The judgment of the District Court is

AFFIRMED.

 COLLINS V. LUCAS COUNTY.

1. **Services: PHYSICIAN: PAUPER.** Where a physician rendered services to a pauper at the request of the township trustees, it was *held* to be competent for the board of supervisors to waive a certificate from the trustees that the services had been rendered, and that the physician was entitled to recover against the county.

Appeal from Lucas Circuit Court.

WEDNESDAY, April 9.

ACTION to recover for medical services rendered by plaintiff to a pauper. The services were rendered at the request of the trustees of the township where the pauper resided. The

Collins v. Lucas County.

plaintiff's bill was presented to the board of supervisors, who refused to allow the same. The defendant, for answer, denies the rendition of the services, and further says that the defendant has a poor-house, and has always been able, ready and willing to care for all indigent poor applying for aid; that application for aid was never made in this case; and defendant further says that it has a physician employed by the year to treat all indigent poor of the county. There was a trial without a jury and judgment for the plaintiff. The defendant appeals.

J. N. McClanahan, for appellant.

Mitchell & Penick, for appellee.

ADAMS, J.—Section 1366 of the Code provides that “all claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees, and presented to the board of supervisors.” The plaintiff’s bill was not so certified. It is insisted, therefore, that he should not be allowed to recover.

Conceding that this case is within the purview of the section above cited, we think it was competent for the board to waive the trustees’ certificate if satisfied of the truth of all that the certificate would show, and in our opinion they did waive the certificate in this case. The record not only fails to show that any objection was made to the bill on the ground that it was not properly certified, but the defense is placed expressly upon other grounds.

AFFIRMED.

Warnock v. Richardson.

WARNOCK V. RICHARDSON ET AL.

1. **Promissory Note:** ASSIGNMENT: PARTY. The holder of a negotiable promissory note may maintain an action thereon, though it has not been indorsed to him, by showing that he is the owner otherwise than by indorsement.

Appeal from Decatur District Court.

WEDNESDAY, APRIL 9.

ACTION on a promissory note. The cause was tried to the court without a jury, and judgment rendered for plaintiff. Defendants appeal.

Harvey & Young, for appellants.

Warner & Bullock, for appellee.

BECK, CH. J.—The note in suit is payable to the order of W. S. Warnock, administrator of the estate of J. B. Girdner, deceased. The petition alleges “that said
1. PROMISSORY note: assign-
ment: party. note was part of the assets of the estate of J. B. Girdner, deceased, and as such was turned over by the administrator, W. S. Warnock, to M. J. Girdner, guardian of the minor heirs of said J. B. Girdner, as a part of the distributive shares of said minor heirs; and said M. J. Girdner, guardian, as such guardian, is the holder and owner of said note.”

The plaintiff is described in the proceedings as “W. S. Warnock, administrator of the estate of J. B. Girdner, deceased, for the use of M. J. Girdner, as guardian of minor heirs of J. B. Girdner, deceased.”

The answer of defendants admits the execution of the note, but denies that plaintiff has the right to sue thereon. The note does not appear to be indorsed by the payee. The record does not disclose the evidence upon which the case was tried.

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The defendants regard M. J. Girdner as the plaintiff, and counsel for plaintiff seem to concur in this view. Without inquiring whether this position be correct, we regard it as admitted, and consider the case accordingly.

The holder of a negotiable note may maintain an action thereon, though it has not been indorsed to him, by showing that he was the owner under an assignment made otherwise than by indorsement. *Barthol v. Blakin*, 34 Iowa, 452; *Moore et al. v. Lowrey et al.*, 25 Iowa, 336; *Allison et al. v. Barrett*, 16 Iowa, 278.

The record fails to show that there was not evidence authorizing the court to find that the note had been transferred to plaintiff in some manner recognized by the law as valid. We will presume there was such evidence.

AFFIRMED.

CARPENTER V. BROWN.

1. **New Trial: PETITION: APPEAL.** The right of appeal expires in six months from the rendition of the judgment; and this right is not revived by filing a petition for a new trial.
2. ———: ———: **JURY.** Where a petition for a new trial is filed in accordance with the provisions of section 3155 of the Code, it is for the court without a jury to "first try and decide upon the grounds to vacate or modify the judgment."
3. ———: **NEWLY DISCOVERED EVIDENCE.** A new trial should not be granted on the ground of newly discovered evidence, when such evidence, if produced, would not authorize a different judgment from that before rendered.

Appeal from Wapello Circuit Court.

WEDNESDAY, APRIL 9.

THIS action was originally brought against F. E. Hills and Joseph Brown on two notes, amounting to one thousand six hundred and thirty-six dollars and forty-four cents and inter-

50	451
85	720
50	451
102	404
50	451
105	471
50	451
135	595
50	451
136	140
50	451
141	733

Carpenter v. Brown.

est, executed by F. E. Hills and F. C. Schwabkey, secured by mortgage on certain property and woolen mill machinery therein, and on a note of one hundred and fifty-six dollars executed by F. E. Hills. It is alleged that the defendant Brown purchased the interest of Schwabkey in said machinery and business, and as consideration assumed the obligations of Schwabkey in relation to said notes, and to pay the same, and that for a valuable consideration Brown agreed to pay the note executed by F. E. Hills. The answer of Brown denies these allegations.

The cause was tried by the court, and in March, 1876, judgment was rendered against the defendant Hills for the amount of the notes, and against plaintiff, and in favor of the defendant Brown.

On the 13th day of October, 1876, the plaintiff filed a petition for a new trial. In November, 1877, the cause came on to be heard upon the petition for a new trial. The plaintiff demanded a jury to try the issues raised by the petition for a new trial, which demand the court overruled, and the plaintiff excepted.

The court tried the issues presented by the petition for a new trial, and refused to grant a new trial, and rendered judgment against the plaintiff for costs. The plaintiff appeals.

Wm. McNett and H. B. Hendershott, for appellant.

Stuart Bros. & Bartholomew, for appellee.

DAY, J.—I. Some of the errors assigned and argued relate to the proceedings on the original trial, and the sufficiency of
1. new trial: the evidence to support the judgment rendered
petition: therein. The petition for a new trial was not filed
appeal. until after the expiration of six months from the rendition of the judgment. The right to appeal was gone when the petition for new trial was filed, and it could not be revived by the filing of the petition. We can now consider only the ques-

Carpenter v. Brown.

tions pertaining to the trial of the issues raised on the petition for new trial. See *Cohol v. Allen*, 37 Iowa, 449.

II. The court refused, upon the demand of the plaintiff, to submit the issues arising on the petition for a new trial to 2. ____: ____: a jury. This action of the court is assigned as jury. error. The petition for new trial was filed under section 3155 of the Code, which provides: "Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied without answer. The case shall be tried as other cases, by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered."

Section 3159 is as follows: "The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action."

Section 3160 provides: "The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action."

The arrangement of these sections seems now to require a different construction from that placed on them in *Chicago & N. W. R. Co. v. Gillett*, 38 Iowa, 434.

The plaintiff claims the right to a jury trial under the provision of section 3155, that "the case shall be tried as other cases by ordinary proceedings." This provision, however, must be construed in connection with other portions of the chapter. Section 3160 provides that "the court may first try and decide upon the grounds to vacate or modify a judg-

Carpenter v. Brown.

ment or order." Here is a very strong implication that the trial is to be by the court. If the trial may be by jury, then, under section 3160, two distinct jury trials may be had; one to try and decide upon the grounds to vacate or modify the judgment, and one to try and decide upon the validity of the defense or cause of action.

An innovation so startling as the submission to a jury of the question whether a party shall be granted a new trial should not be engrafted upon the law, unless it clearly appears that the Legislature intended such change. Taking together all of the provisions of the chapter in which the section under consideration occurs, we do not think such change was intended. Section 3155, it is to be observed, applies to subdivision 1 of section 3154, which authorizes the court to vacate or modify a judgment or order "by granting a new trial for the cause within the time and in the manner prescribed by the sections on new trials." The sections referred to are 2837-2843.

The provision of section 3155, that the case shall be tried as other cases, by ordinary proceedings, refers, we think, to the mode of producing evidence as contradistinguished from the mode of sustaining and controverting the allegations by affidavits.

The court did not err in refusing to grant a jury trial.

III. It is urged that the court erred in refusing, upon the merits of the application, to grant a new trial. The petition

3. ———: newly
discovered evi-
dence. for a new trial is based upon the ground of newly discovered evidence. The newly discovered evidence is the testimony of F. E. Hills, whose deposition was taken and read upon the former trial. It is alleged that he will now testify differently from what he did at the former trial. In support of the petition for new trial the deposition of F. E. Hills was read, in which he testifies in all material respects directly in opposition to what he testified on the former trial, and denies specifically and with particularity that he ever testified as the deposition submitted on the former

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trial shows he did. For instance: In his former deposition he testifies that he was not present when Brown bought Schwabkey's interest in the woolen mill, and that he knows nothing of the contract between them. In his second deposition he testifies that he was present and heard the contract, and that Brown, as part consideration of the purchase, agreed to assume and pay the debts in question; and he specifically denies that in his former deposition he testified that he was not present. It is apparent that his testimony is utterly unworthy of consideration. No new trial ought to be granted on account of it. If it were produced upon the new trial it would not authorize any different judgment from that which was rendered. See *Millard v. Singer*, 2 G. Greene, 144; *State v. Bowman*, 45 Iowa, 418. The court did not err in refusing to grant a new trial.

AFFIRMED.

THE JOLIET IRON & STEEL CO. v. THE C., C. & W. R. CO. ET AL.

1. **Practice:** TRIAL UPON WRITTEN EVIDENCE. Prior to the taking effect of chapter 145, Laws of 1878, a compliance with the provision of section 2742 of the Code was necessary to secure a trial *de novo* in the Supreme Court.
2. ———: EXCEPTION. An exception first taken three and one-half months after the decree is settled, signed and entered of record, does not furnish any basis for a review of the case.

Appeal from Clinton District Court.

THURSDAY, APRIL 10.

On the 19th day of November, 1875, the Joliet Iron & Steel Company commenced an action against the Chicago, Clinton & Western Railroad Company, and the Iowa Southwestern Construction Company, for the establishment and enforcement of a lien against the defendants, and against the line of railroad described, for seventy-five thousand two hundred and

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seventy-four dollars and nineteen cents, on account of materials furnished the Iowa Southwestern Construction Company for the track laying upon a certain railroad bed belonging to and being constructed under the charter of the Chicago, Clinton & Western Railroad Company.

The petition in this case alleges that the Chicago, Clinton & Western Railroad Company, and the Iowa Southwestern Construction Company, are mutually interested in the railroad property upon which a lien is claimed.

On the 22d day of November, 1875, upon due notice, Edward H. Thayer was appointed receiver of the entire line of railroad of the defendant, the Chicago, Clinton & Western Railroad Company.

On the 24th day of June, 1876, the receiver filed a report showing that there came into his hands sixteen and one-half miles of completed track on said road, and an uncompleted road-bed and located line from Clinton to Iowa City, with ties distributed three-fourths of a mile in Scott county; that there had been expended upon said road about five hundred thousand dollars, and that besides the liens claimed by plaintiffs there had been filed other mechanics' liens against the property, amounting in the aggregate to about sixty-four thousand four hundred and forty-seven dollars and fifty-three cents; that the property was wholly unavailable, without profit or income, and speedily going to waste; that contracts could be made on reasonable terms for building the uncompleted portions of the road, to be paid in receiver's certificates, issued under the authority of the court. The receiver asked the direction of the court in the premises.

On the 27th day of July, 1876, the court authorized the receiver to build the unconstructed portions of the railroad of the Chicago, Clinton & Western Railroad Company, from Clinton to Iowa City, and ordered that the indebtedness incurred should be treated as receiver's indebtedness, and be a first lien on all the property of the railroad company. To the making of this order Waulbaum, Bridges & Co., as inter-

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venors in the cause, excepted. The Iowa Southwestern Construction Company was present by counsel, and took no exception to this action of the court.

On the 8th day of March, 1877, the South St. Louis Iron Company filed a petition of intervention, claiming a first lien upon all the property of said railroad company, under receiver's certificates issued pursuant to authority of the court, amounting, exclusive of interest, to fifty thousand dollars. Intervenor asked that the railroad property be sold to pay the receiver's certificates held by intervenors, and other certificates of like character. Intervenor further prayed that the court decree all receiver's certificates, issued on and after the 1st day of October, 1876, to be void, or that the payment thereof be postponed until after the payment of all certificates issued prior to that date. The Iowa Southwestern Construction Company answered this petition of intervention, not denying, but impliedly admitting, petitioners' right to a lien; denying that the certificates issued on and after October 1, 1876, are void; alleging that the receiver issued in all certificates to the amount of one hundred and ninety-two thousand five hundred and sixteen dollars and thirty cents, and asking that no decree for the sale of the property be made until each and every holder of the other certificates is brought into court and made a party. A decree was entered as of date July 10, 1877, for the sale of all the property, of whatever kind, of the Chicago, Clinton & Western Railroad Company, and the application of the proceeds to the payment of the receiver's certificates, in a manner fully and specifically pointed out in the decree.

On the 5th day of March, 1878, the following modification of the decree was made, to-wit:

"Now, on this 5th day of March, 1878, this cause coming on for hearing, on motion of the Iowa Southwestern Construction Company to modify the decree of foreclosure as respect to date of decree, it is ordered by the court that said decree,

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entered as of date July 10, 1877, be modified by adding on to the end thereof the following words, viz.:

“ ‘This decree is actually signed by the court, in term time, and enrolled on the 22d day of November, 1877. The terms of said decree not having been fully settled until that date, and in view of the fact that so long a time has elapsed since the date as of which the decree is entered, it is now ordered by the court that the six months in which to take an appeal from this decree shall not commence to run until the said 22d day of November, 1877. No party takes any exception to this modification.’

“And now, on this 5th day of March, 1878, the Iowa Southwestern Construction Company excepts to the decree made in said cause.”

On the 4th day of March, 1878, the Iowa Southwestern Construction Company appealed.

Kretzinger, Veeder & Kretzinger and C. C. Cole, for appellant.

J. & S. K. Tracy, for the Chicago, Clinton & Western Ry. Co.

Cook & Richman, for the South St. Louis Iron Co.

S. P. McConnell and Henry Crawford, for the Joliet Iron & Steel Co.

DAY, J.—I. This is an equitable proceeding. The decree was fully settled, signed by the court and enrolled on the 22d day of November, 1877. The case is governed
1. PRACTICE: trial upon written evidence. by section 2742 of the Code. Chapter 145, Seventeenth General Assembly, does not apply to this case. *Simondson v. Simondson, ante, 110.*

II. It does not appear that any motion was made for trial upon written evidence as provided in section 2742 of the Code. There is no statement that the record contains all the evidence upon which the cause was tried. The case can be reviewed here only as a law action, upon exceptions duly taken and errors properly assigned.

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III. No exception was taken by appellant to any ruling or decision of the court until the 5th day of March, 1878, three and one-half months after the decree was settled, signed and entered of record. An exception so taken cannot furnish a basis for reviewing the action of the court. The only provision for taking an exception, at a time subsequent to the ruling of which complaint is made, is contained in section 2789 of the Code. This section applies only to exceptions to the charge of the court, and the time for filing them is limited to three days after the verdict. The record in this case presents no question which we can properly review.

AFFIRMED.

ROTHROCK, J., took no part in the decision of this case.

FISHER V. THE SCHILLER LODGE.

1. **Principal and Agent:** WHO IS NOT AN AGENT. If a debtor employs an agent to carry money to his creditor, the creditor, by accepting the money, does not make the messenger his agent so that, if at another time the messenger should appropriate the money, the loss would be that of the creditor and not of the debtor.

Appeal from Dubuque Circuit Court.

THURSDAY, APRIL 10.

THE plaintiff claims of the defendant six hundred dollars and interest, and alleges that the decedent, her husband, while in life, was a member of the Schiller Lodge, No. 11, Independent Order of Odd Fellows, of Dubuque, and complied fully with all the requirements laid down in the charter, by-laws and rules of said association; that the articles of incorporation, by-laws and rules of said corporation provide that, upon the death of a member who has complied with the charter,

50	459
85	549
50	459
105	515
50	459
123	572

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by-laws and rules, there shall be paid to his personal representatives the sum of five hundred dollars, together with the expenses of his last sickness. The answer denies all the allegations of the petition. There was a jury trial, and a verdict and judgment for plaintiff for five hundred and forty-eight dollars and seventy-five cents. The defendant appeals.

Fouke & Lyon, for appellant.

No argument for appellee.

DAY, J.—The constitution of the defendant provides that any member who may be indebted for three months' dues shall be suspended from all pecuniary benefits for one month after paying said amount. The by-laws provide that each member of the lodge shall pay weekly the sum of ten cents to the fund of the lodge, and that upon the death of a member who is entitled to benefits the trustees shall pay without delay, for the benefit of the surviving family, the sum of one hundred dollars out of the widows' and orphans' fund, and four hundred dollars within three months after the death of such member, fifty dollars of which shall be considered as funeral expenses.

The pivotal question in this case is whether or not the deceased, Louis Fisher, was indebted to the lodge at the time of his death for three months' dues. The books of the lodge show conclusively that at the time of his death Louis Fisher was indebted for dues in the sum of three dollars and thirty-five cents, or for thirty-three and one-half weeks. The testimony of the plaintiff, in substance, is that on the evening of September 6, 1875, her husband, not being able to go to the lodge himself, handed her money to pay his dues, saying it was two dollars and a half, and directed her to give it to Sam Elemer to carry to the lodge, and if he were not going to give it to plaintiff's brother-in-law (Duttle), and request him to carry it to the lodge; that Elemer was not going to the lodge, and plaintiff handed the money to Duttle, who

1. PRINCIPAL
and agent:
who is not
an agent.

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promised to deliver it to the lodge. Duttie testifies that plaintiff handed him two dollars and fifty cents to take to Schiller Lodge to pay dues; that he received the money and went to the lodge, which was not open; that he then went into Shill's saloon to wait until the first man came in to go to the lodge; that Philip Durenberger came in, and witness handed him the money—told him it was two dollars and fifty cents from Mrs. Fisher to pay to Schiller Lodge; that Durenberger took the money and witness went away.

Durenberger denies that he ever received this money, and testifies positively that he never paid it to the lodge.

The jury found specially that Louis Fisher, at the time of his death, was not in arrears for three months' dues to Schiller Lodge; that the witness Durenberger, by the practice and approval of the lodge, was authorized and empowered by the defendant to receive on behalf of the lodge the weekly dues of its members, and that Fisher, in his life-time, paid to the lodge the dues claimed to be delinquent through Durenberger. It is thus apparent that the jury found that Durenberger was the agent of defendant, authorized by the conduct and approval of defendant to receive dues, and that payment to him was payment to the defendant. The verdict of the jury is entirely without warrant in the testimony. Durenberger was simply the janitor of the lodge. He was not even a member of Schiller Lodge. He testifies as follows: "My business is doing any kind of work that comes. * * * I have to attend to cleaning rooms, carrying water, making fires, and keeping the place clean. * * * During the time I have been discharging the duties of my office I have received sometimes, once in a while from all lodges, dues or money from different persons to be paid into Schiller Lodge, and have paid it in as dues. I have sometimes, but not often, money from members of this lodge. I have no right to take any money; no man has a right to give me any. I do pay over some, but very little, because it is not my duty to do it."

It is apparent that Durenberger, whenever he received

Hanna v. Andrews.

money, received it merely as the messenger or agent of the member paying it. The lodge never did anything to ratify his authority to receive money except to receive the money when tendered in the lodge. If a debtor employs an agent to carry money to his creditor, the creditor, by accepting the money, does not make the messenger his agent, so that if at any time the messenger should pocket the money the loss would be that of the creditor and not that of the debtor. The record discloses a case exactly parallel to the one supposed. If Durenberger received the money he received it as the agent of Fisher, and his failure to pay it to the lodge is the misfortune of the plaintiff, for which the defendant cannot be held responsible.

REVERSED.

HANNA V. ANDREWS.

1. **Contract: SALE OF GOOD-WILL.** Where a land agent sold his business and the good-will thereof to another, with an agreement not to re-engage in the business in the same place for three years, it was *held*, that after the expiration of that time he was not debarred by the contract from soliciting the agency for the same lands he had in charge when the contract was made.

Appeal from Audubon District Court.

THURSDAY, APRIL 10.

ACTION for injunction to restrain the defendant from violating a contract entered into by him with the plaintiff. The petition shows that on the 8th of September, 1874, the defendant had been engaged, in the town of Exira, Audubon county, in the practice of the law, and in buying and selling real estate, and acting as agent for real estate owners; that he was the agent for the sale of several thousand acres, of which he had a list; that on the day aforesaid he entered into a contract with the plaintiff whereby he sold to the plain-

Hanna v. Andrews.

tiff his land and law business, including his business as real estate agent, and his good-will in the business in said county. The contract was reduced to writing, and a copy is attached to the petition. It provides in substance that Andrews sells to Hanna for five hundred dollars his entire land and law business, and business as real estate agent, and his good-will and influence, and a list of all his correspondents, and agrees to give him letters of introduction to the correspondents, and render him assistance in communicating with them, and not to engage in the land business or practice of the law within the county for the space of three years.

The petition avers that the plaintiff has returned to the land business in the town of Exira, and has been engaged in the same since July 1, 1878; that he has published notice of that fact and solicits public patronage; that he has addressed letters, cards and circulars to the owners of lands embraced in the list sold and transferred to the plaintiff, and has already secured the agency for the sale of some of the lands embraced in such list, and has sold some of the lands.

A temporary injunction was issued, and afterward the defendant moved to dissolve on the ground that the petition fails to show a breach of the contract. The court dissolved the injunction, and the plaintiff appeals.

John M. & R. W. Griggs, for appellant.

M. Nichols and Nourse & Kauffman, for appellee.

ADAMS, J.—It is not claimed that the defendant did anything inconsistent with his contract until after the expiration of three years. The question presented is as to whether, after that time, it was allowable for him to solicit the agency of the very lands, the list of which he had transferred to the plaintiff, and which he had agreed to assist the plaintiff in obtaining the agency of. The plaintiff maintains that, while the defendant might return to the land agency business after the lapse of three years and compete

1. CONTRACT:
sale of good-
will.

Hanna v. Andrews.

with him in a general way, he should not under his contract be allowed to compete with him for the agency of the lands in regard to which they had specifically contracted.

It is not contended by the appellant that the appellee has not transferred to him all that he agreed to transfer. The breach of the contract then, if any, does not consist in the omission to do something which the appellee agreed to do, but in doing something which the appellee agreed not to do. If there is a breach of the contract in soliciting the agency of the lands embraced in the list transferred to the appellant it is because the appellee agreed that he would not solicit the agency of such lands. Now there is no pretense that there is any express agreement to that effect except for the period of three years from the date of the contract. If there is an agreement to that effect it arises by implication of law from an express agreement. What appellee agreed to do was to transfer his list of lands and correspondence, and the good-will of his business, and give letters of introduction. If we should concede that the sale of the good-will of a business, without restrictions upon the seller, would raise an implied agreement not to re-engage in the same business in the same place, such concession would not, we think, aid the plaintiff. By the terms of the appellee's contract it was allowable for him after three years to re-engage in the land agency business, and the only question is as to what extent he may do so.

It appears to us that when the appellant provided for the return of the appellee to the business after three years, he opened the door to the appellee to come in and compete with him in every respect. The appellee, if applied to, could certainly accept the agency of the lands in question. He could certainly compete for the agency by general advertisement, by acquaintance, and by fidelity to business. The courts, we think, could not properly undertake to draw the line between such competition and that which should be carried on by more or less direct solicitation.

AFFIRMED.

 Conway v. The Ill. Cent. R. Co.

CONWAY V. THE ILL. CENT. R. CO.

50	465
92	694
50	465
107	605

1. **Negligence: PLEADING.** An allegation that defendant's officers and agents negligently directed plaintiff to make a coupling between cars of a different height, which required for the purpose a crooked link, without providing such link, as he had requested them to do for the proper discharge of his duties, set out, in connection with an averment of plaintiff's own care and diligence, a cause of action against the defendant.
2. ———: **RAILROADS: DEGREE OF CARE REQUIRED.** Railway companies are required to use only a reasonable degree of care in providing safe cars, machinery and other appliances rendered necessary in the operation of their roads.

• *Appeal from Black Hawk District Court.*

THURSDAY, APRIL 10.

ACTION for a personal injury. The plaintiff was a brakeman and baggage-master on defendant's road, and was injured while in the act of attempting to couple a freight car to a baggage car.

It is averred in the petition that "the baggage car was provided with a coupling known as the Miller patent buffer and coupler; that the freight cars were only provided with the common bumpers or draw-heads, and some of said freight cars so provided and used by defendant were not high enough to couple with said Miller patent buffer and coupler with certainty and safety, without the use of what is called a crooked link; that said freight cars that would couple to said patent buffer and coupler without the aid of the crooked links were by the said defendant, its officers and agents, superior in authority to plaintiff, mixed indiscriminately, negligently and carelessly with those that would not, as aforesaid, so that plaintiff, in the discharge of his duties of coupling, did not and could not know whether the freight cars to be coupled upon said baggage car were high enough and suitable to be coupled to the same; that when the said train was at Lyle, on said October 7, 1876, as afore-

Conway v. The Ill. Cent. R. Co.

said, the said freight car next to the said baggage car, and which coupled thereto all right, was, by the direction of the defendant and its officers, removed from said train and placed upon the side track, and the remaining freight cars backed up to be attached to said baggage car; that it was a part of plaintiff's duty to make said coupling, and while discharging said duty and acting under the direction of his superior officers in that behalf, and without knowledge that said car so to be coupled was not high enough to be so attached with a straight link, and without fault or negligence upon his part plaintiff attempted to make said coupling with a straight link, but was unable so to do on account of said freight car being too low to couple to said baggage car with said straight link; that said defendant carelessly and negligently failed to provide any crooked links for the use of plaintiff in the discharge of his said duties, although often requested so to do; and plaintiff avers that by reason of the careless and negligent acts of said defendant, its officers and agents, in using and mixing the said freight cars, and in failing to provide crooked and suitable links for their use as aforesaid, he failed, without fault on his own part, to make said coupling, and said freight car came back with great violence against said baggage car, jamming and crushing plaintiff between said cars, breaking his collar bone, bruising his shoulder, mangling his flesh and injuring him internally, whereby plaintiff has and will suffer great pain, and will be put to great expense, loss of time, health and strength, and will continue to be, for the balance of his natural life, crippled, weak, in great pain, and incapacitated to perform manual labor."

The answer of the defendant was: *First*, a general denial; *second*, that the injury, if any, was contributed to by plaintiff's own negligence; and, *third*, that the injury took place in the State of Minnesota, and was caused by the negligence of a co-employee engaged in the same general business, and that the common law is in force in that State, and defendant is not

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Conway v. The Ill. Cent. R. Co.

liable for any injury caused in that State to plaintiff by the negligence of a co-employee.

There was a trial by jury. A verdict was returned for the plaintiff for two thousand seven hundred dollars. A motion for a new trial was made, which the court overruled upon plaintiff offering to remit seven hundred dollars from the verdict, and judgment was entered for the plaintiff for two thousand dollars and costs. Defendant appeals.

John F. Duncombe, for appellant.

Miller & Preston, for appellee.

ROTHROCK, J.—I. It is first urged in argument by counsel for appellant that the petition does not state a cause of action. Without taking the time and space
1. NEGLIGENCE:
pleading. necessary to a discussion of this objection we deem it sufficient to say that the petition details a series of negligent acts upon the part of the defendant which, if true, constitute a cause of action. It is averred that some of the freight cars were not high enough to couple with the Miller buffer and coupler without the aid of a crooked link; that defendant, its officers and agents, superior in authority to plaintiff, negligently and carelessly mixed the freight cars so that plaintiff, in the discharge of his duties of coupling, did not and could not know whether the freight cars to be coupled to the baggage car were high enough and suitable to be coupled to the same. There are proper allegations as to the negligence of defendant's officers and agents, at the time the accident occurred, in backing up a freight car which was too low to be coupled to the baggage car without a crooked link, the plaintiff's ignorance of that fact, and his attempt to couple with a straight link, which failed, and his consequent injury by the cars coming together with great force.

These allegations, coupled as they are with proper averments of the plaintiff's care and diligence, and his requests before that made that the defendant should provide crooked

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links for the use of plaintiff in the discharge of his duties, it seems to us is a sufficient statement of a cause of action.

II. It is objected that the first and second instructions given by the court to the jury are erroneous, because they are incorrect statements of the issues. In the first instruction the court stated that "the injuries were alleged to be caused by a failure to couple on account of the unequal height of the cars and the absence of crooked links." It appears to us that this is a clear and fair statement of just what the plaintiff alleged in his petition, and couched in plain and unambiguous language, such as ought to be employed in framing instructions for a jury. Stripped of the verbiage of the petition it is just what the plaintiff complained of.

In the second instruction the court said: "The answer of the defendant contains a general denial, and also alleges that the accident, if any occurred, was caused by the plaintiff's own negligence." * * * *

That this was an incorrect statement of the issue as to contributory negligence cannot be denied; but we are not prepared to say that the judgment of the court below should be reversed for this error. It occurs, not in the charging part of the instruction, but in a mere recital of the issues, and in the very next instruction the jury are correctly informed that in order for the plaintiff to recover he must prove "that the injury occurred without any negligence or fault on the part of the plaintiff which contributed to produce it."

It is not necessary, however, that we should determine whether this error in the statement of the issues was prejudicial, in view of the fact that the cause must be reversed upon the ground to which we will now direct our attention.

III. In its ninth instruction the court said to the jury: "It was the duty of the railroad company to furnish cars and appliances for operating the same that are not dangerous to those engaged in their operation, and if it failed in this duty, and the plaintiff was injured thereby, without any fault and negligence on his part,

2. ———: rail-
roads: degree
of care re-
quired.

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the company will be liable, and you should so find." * * * This proposition is clearly erroneous. It was doubtless a mistake which inadvertently occurred, for there can be no doubt that the learned judge, who tried the case in the court below, never intended to say to the jury that cars and appliances which are not dangerous in their operation are required to be furnished by a railroad company. That the operation of all railroad trains is necessarily attended with danger is the universal experience of mankind. All that the law requires of a railroad company to protect itself against claims for personal injuries by its employes is reasonable care in providing safe cars, machinery and appliances.

It is urged by counsel for appellee that this part of the instruction is not erroneous when considered in connection with other instructions which were given. It is true the court, in its fourteenth instruction, directed the jury that "if the railroad company used such cars and appliances for coupling the same as are in ordinary and common use by first-class railroads through the country, that is all the law requires or demands of them." * * * * *

The most that can be claimed for this, and some other expressions in other instructions, is that they are impliedly contradictory of the ninth instruction. Which of these contradictory instructions the jury followed it is impossible to determine, and we cannot say there was no prejudice resulting from the error.

Other objections raised by appellant need not be considered, as the judgment, for the error above pointed out, must be

REVERSED.

CONRAD & EWINGER ET AL. V. STARR ET AL.

50	470
90	215
50	470
104	349
50	470
111	163

1. **Husband and Wife: TRUST.** A deed of trust by a husband, in favor of his wife, provided that the rents and profits of the property conveyed should be paid to the wife, and that she should control them for her sole and separate use, independent of the control of her husband: *Held*, that upon the death of the wife the husband became entitled to one-third of the land in fee, and to a life estate in the remainder.
2. **Mechanic's Lien: TENANTS IN COMMON.** Where several tenants in common mortgaged the joint property for an improvement thereon, the tenant who expended the money without applying it as intended could not recover from his co-tenants for any improvement he might have made.
3. ———: **PRIORITY OF LIENS.** Before the enactment of chapter 100, Laws of 1876, the only manner of establishing the priority of a mechanic's lien on a building, over a pre-existing incumbrance on the land, was by the sale and removal of the building; and where the nature of the improvement was such that it could not be removed, the lien of the mechanic must have been postponed to the lien upon the land.
4. ———: **COMMENCEMENT OF BUILDING.** The commencement of a building, under the mechanic's lien law, is the first labor done on the ground, which is made the foundation of the building, and is to form part of the work suitable and necessary for its construction.
5. ———: **RIGHT OF REMOVAL.** The right of removal of a building to enforce a mechanic's lien depends upon the fact as to whether it is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain.

Appeal from Des Moines District Court.

THURSDAY, APRIL 10.

THIS is an action brought by the several plaintiffs to establish and enforce a number of distinct mechanics' liens. By consent of parties all the issues in the cause, both of fact and of law, were referred to C. L. Poor, Esq. On the 18th day of February, 1878, the referee filed his report, finding the facts and conclusions of law as follows:

"1. On the 18th day of July, 1846, W. H. Starr, origi-

Conrad & Ewinger v. Starr.

nally one of the defendant's herein, was the owner in fee of lot No. 535 in Burlington, Iowa.

"2. At said date W. H. Starr, for a valuable consideration, conveyed said lot to Joseph W. Camp upon the following trust, to-wit: That said Camp should receive the rents and profits and pay the same to Frances C. Starr, the wife of said W. H. Starr, or permit her to use the same for her sole and separate use, independent of the control of her said husband, and after her death to her heirs, subject to a life estate in the said W. H. Starr if he should survive his wife; said trustee to execute a deed for the whole or any part of the premises, upon request of said Frances C. Starr, and to such person or persons as she might direct.

"3. The said conveyance was duly recorded in Des Moines county, August 28, 1846.

"4. Said Frances C. Starr died in December, 1874, prior to any conveyance by said trustee.

"5. W. H. Starr died December 28, 1876, totally insolvent.

"6. After the death of his said wife W. H. Starr formed the purpose of erecting upon said lot 535 a block of stores, and on the 1st day of April, 1875, for the purpose of raising money to erect the same, agreed to borrow of John B. Trevor, one of the defendants herein, twelve thousand dollars for five years; the payment thereof, with ten per cent interest per annum, to be secured by mortgage upon said lot, with other real property—the interest payable semi-annually with exchange on New York.

"7. The defendants W. E. Starr, Caroline S. Cameron, Fanny Starr, and Walter C. Starr, the only children and heirs of said Frances C. Starr, joined with said W. H. Starr in executing a mortgage upon said lot No. 535, and other property, to secure Trevor in the sum so borrowed, with interest as agreed. The said mortgage bears date April 1, 1875, and was filed for record April 12, 1875, at 11 o'clock A. M.

"8. The defendant Trevor actually advanced the money

Conrad & Ewinger v. Starr.

on said loan at or about the time said mortgage was filed for record. The whole amount, except six months' interest, is unpaid.

"9. Between April 1 and April 10, 1875, the foundation of said block was staked out on the north forty feet of lot 535, and the lines thereof marked by stakes, and a small frame kitchen twelve by sixteen feet on said lot, but attached to a brick house on the lot adjoining, was removed in order to make room for the new erection. Some cellar doors or window frames had been made at the shop by the superintendent of the work, some distance from said lot, prior to April 16, 1875. Models of a sheet-iron cornice were made in March of the same year, at the request of said W. H. Starr, which models were afterward, in pursuance of the original plan, actually used in the cornice of the building. Prior to April 10th a superintendent of the work had been engaged and some rubbish removed from the lot.

"10. The excavation for cellar and foundation was commenced about April 21, 1875, and the building entirely completed prior to April 1, 1876, and it is located upon the north forty feet of lot 535. The lot is one hundred and seventeen feet deep, and the building sixty feet deep.

"11. The erection was designed and completed as a block of stores, but was afterward changed and used as a hotel, and was and is an original independent structure—a brick building three stories in height, with stone foundations. The building is conceded to be worth six thousand five hundred dollars, and the lot three thousand five hundred dollars.

"12. The several plaintiffs performed labor and furnished materials in and about the erection of said building, at the instance and request of said W. H. Starr, which labor and materials were furnished at the respective dates, and were of the respective values; and claims for mechanic's liens therefor upon said lot and improvements were duly filed, as set forth in their claims, for liens herewith submitted. * * All of which claims are due and unpaid.

Conrad & Ewinger-v. Starr.

"13. On the 14th day of June, 1876, the Merchants' National Bank got judgment against W. H. and Walter C. Starr for one thousand five hundred and twenty-six dollars and seventy-five cents.

"14. On the 5th of June, 1876, L. C. Purdee got judgment against W. H. Starr for forty-five dollars.

"15. On the 9th day of May, 1876, Acres, Blackmar & Co. recovered judgment against W. H. Starr for one hundred and fifty-seven dollars and twenty cents.

"16. On the 1st day of June, 1876, the First National Bank of Burlington, Iowa, obtained judgment against W. H. and Walter C. Starr for the sum of one thousand four hundred and forty dollars and seven cents.

"17. On the 11th day of April, 1876, the defendant W. H. Starr, by quit-claim deed, conveyed to the defendant Susan A. Whittlesey all his interest in said real estate in consideration of a pre-existing debt due from said Starr to her. This conveyance was recorded April 18, 1876.

"18. It is conceded that the frame kitchen mentioned in the ninth finding was removed from the north to the west side of the said brick house at the time preparation was made for the erection of the building in controversy; and about the time when said building was completed—the purpose for which it had been built having been changed—said kitchen was again removed and attached to the new erection, and used as a kitchen in connection with the new building, then used as a hotel known as the 'Starr House.'

"19. The said W. H. Starr was sixty-one years old at the time of his death, and his expectancy, according to the Carlisle tables, was fourteen years.

"20. It is agreed by all parties that this cause may be tried and disposed of without the appointment of an administrator, and as though one had been appointed for said W. H. Starr, deceased, and made a party hereto.

"21. The heirs of said Frances C. Starr knew of and

Conrad & Ewinger v. Starr.

acquiesced in the erection of said building on said lot by said W. H. Starr.

"22. The defendant John B. Trevor, by his agent, knew that the money was borrowed from him by Starr for the purpose of erecting the building in controversy.

"23. The children and heirs of W. H. and Frances C. Starr signed the Trevor mortgage, expecting that with the funds raised their father would erect a block of stores on said lot.

"24. Kaut & Kreichbaum are, by agreement, admitted as parties plaintiff, and the same admissions regarding their claims of one hundred and seventeen dollars and seventy-six cents as are found in regard to the claims of other parties.

"CONCLUSIONS OF LAW.

"1. At the time of the erection of said building the defendant W. H. Starr was seized of an estate for life in the land on which it was erected, and by virtue of section 2440 of the Code of Iowa he was also entitled to the one-third in fee in the same land, subject to said life estate.

"2. The defendant W. H. Starr was the owner of the building within the meaning of the act.

"3. The facts set forth in the ninth finding of fact do not constitute a commencement of the building within the meaning of the law.

"4. The lien of the mortgage of Trevor is entitled to priority over all other liens upon the land.

"5. The mechanics and material men are entitled to a first lien upon the entire building, and also to a lien upon an undivided one-third of the land, subject to the prior lien of the Trevor mortgage.

"6. The defendant Susan A. Whittlesey took the interest of W. H. Starr in the property incumbered only by the foregoing liens.

"7. The First National Bank has a lien for its judgment on Walter C. Starr's interest, junior to the foregoing liens.

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"8. The Merchants' National Bank has a lien on the same interest, junior to the foregoing.

"9. The defendants Pardee and Acres, Blackmar & Co. have no interest in or lien on the land or any part of it.

"10. I respectfully recommend that the land and building be sold together, and the proceeds distributed so as to secure to the mortgage of Trevor priority upon the land, and to the liens of said mechanics and material men priority upon the building; and that a decree be drawn in accordance with the foregoing findings and conclusions."

The plaintiffs and the defendants excepted to portions of the report. The court overruled the exceptions of both parties, confirmed the report, and entered a decree for the plaintiffs in accordance therewith. Both parties excepted. The defendants alone served notice of appeal.

P. Henry Smyth, for Fanny C. Starr *et al.*, appellants.

Hedge & Blythe, for John B. Trevor and First National Bank, appellants.

Hall & Baldwin, for appellees.

DAY, J.—I. The first question presented by the record pertains to the interest acquired by Wm. H. Starr in the real estate in controversy upon the death of his wife, Frances. The deed from W. H. Starr to Joseph Walter Camp contains the following: "To have and to hold as aforesaid, upon the following trust: That the said party of the second part shall receive the rents and profits of the above described premises, and pay the same to the said Frances C. Starr, or permit her to use the same for her sole and separate use, independent of the control of her husband, and after her death to her heirs, subject to a life estate in the said party of the first part if he shall survive his said wife. And the said party of the second part covenants with the said party of the third part to discharge the trust above described to the best of his ability, and at any time, upon the request of the

1. HUSBAND
and wife:
trust.

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party of the third part, to execute a deed for the whole, or any part of the described premises, to such person or persons as the said Frances C. Starr may direct."

The plaintiffs claim that at the death of Frances, W. H. Starr, as her surviving husband, became invested with one-third of the property in fee, under section 2440 of the Code, and that he also acquired a life estate in the whole by the provisions of the trust deed.

The defendants claim that, by the trust deed, W. H. Starr cut off his rights as surviving husband, under section 2440, and that at his wife's death he became invested with only the life estate provided for in terms in the deed.

The defendant cites and relies upon *Heard v. Hall*, 16 Pick., 457; *Jacobs v. Jacobs*, 42 Iowa, 600; *Stokes v. McKibbin*, 13 Pa. St., 267; and *Rigler v. Cloud*, 14 Pa. St., 361. In *Heard v. Hall* it was held that a guardian of a person *non compos mentis*, who sold real estate belonging to his ward under a license of court, and conveyed the same with a covenant that he was duly authorized to sell the granted premises, was estopped by his covenant from setting up a claim in his own right to any portion of the real estate, under a previous conveyance to him in his own right. The case applies but remotely to the question under consideration.

In *Jacobs v. Jacobs* the husband and wife, before their marriage, had entered into a contract stipulating that "each is to have the untrammelled and sole control of his or her own property, real and personal, as though no such marriage had taken place." It was held that, under the express contract of the parties, upon the death of the husband the wife could not assert her right of dower in his estate.

In *Rigler v. Cloud* the plaintiff in error, by deed, conveyed the property in dispute to Catharine George and her heirs, in trust for his wife, Maria Rigler, and her heirs forever, to the sole and separate use of the said Maria Rigler and her heirs, and not to be in any way liable to the future control, debts, or liabilities of her present or any future husband. The court

held that the clause of the deed effectually cut off the husband's interest as tenant by the curtesy. Emphasis was placed upon the provision in the deed that the property should not be subject to *the future control* of the husband.

In *Stokes v. McKibbin* the conveyance was to one Harper in trust for Margaret Houston for life, as if she were a *feme sole*, and so that the property shall not be in the power, or subject to the debt, contract or engagement of her present or any future husband, remainder to her appointees by will, and in default to her right heirs. It was held that the husband was not entitled to curtesy in the estate. In all these cases there was some express provision showing an intention that the husband should be barred of all interest in the property. The cases concede that the question is one of intention, discoverable in the declaration of trust. There can be no doubt that a trust may be so declared as to cut off any estate in the husband upon the death of his wife. See *Bennet v. Davis*, 2 P. Wms., 316. In *Morgan v. Morgan*, 5 Madd., 248, a conveyance was made to the mother upon trust for the sole and separate use of the mother for life, with power to the mother to appoint the fee by deed or will, and for want of appointment in trust for the mother, her heirs and assigns. The question was whether the father, who survived the mother, was entitled to be tenant by the curtesy against her son, the mother having made no appointment. The court say:

"The wife was in possession of this equitable estate by receipt of the rents and profits during coverture, and there being issue capable of the inheritance, the husband, according to the rule stated, must be entitled to the curtesy, unless it can be held that the direction that the wife shall take the profits to her separate use amounts to an express intention to exclude him. At law, the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly by a direction

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that upon the death of the wife the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to the tenant by the curtesy. Such a provision was actually made in the case of *Bennet v. Davis*, and was acted upon by this court. Here the husband is partially, and not wholly, excluded from the enjoyment of the wife's property. This court would, according to the intention of the settlement, have restrained him from all interference with the rents and profits during the life of the wife, but there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of his wife."

In the case at bar the deed of trust provides that the rents and profits shall be paid to Frances C. Starr, and that she shall control them for her sole and separate use, independent of the control of her husband. The husband surrenders all control over the rents and profits during the life of his wife, but he does not, in express terms, surrender the interest which the law may give him upon the death of the wife, without having made any disposition of her estate. We are of the opinion that, upon the death of his wife, Wm. H. Starr was entitled to one-third of the real estate in question in fee, under section 2440 of the Code, and to a life estate in the remainder, under the provisions of his deed.

II. The liens in question all arose prior to the taking effect of chapter 100, Laws of Sixteenth General Assembly, and must be enforced under the law as it stood prior to the enactment of that statute. *Brodt v. Rohkar*, 48 Iowa, 36.

III. It is claimed by appellees that W. H. Starr, as tenant in common with the other owners of the lots in question, having made valuable improvements thereon, is entitled to partition thereof, with compensation for the improvements made, and that to this entire interest the mechanic's liens attached, with the right to sell the property, and apportion the respective claims from the proceeds,

2. MECHANIC'S
lien: tenant
in common.

 Conrad & Ewinger v. Starr.

if partition cannot otherwise be effected. Several authorities have been cited by appellees, recognizing the doctrine that where one tenant in common lays out money in improvements on the estate, a court of equity will not grant partition without first directing an account and a suitable compensation; or will, in the partition, assign to such tenant in common that part of the premises on which the improvement is made. See *Green v. Putnam*, 1 Barb., 501; *Swan v. Swan*, 8 Price, 518; *Conklin v. Conklin*, 3 Sandf. Ch., 64; *Felix v. Rankin*, 3 Edw. Ch., 323; *Town v. Needham*, 3 Paige, 546; *Hall v. Piddock*, 21 N. J. Eq., 311; *Drennen v. Walker*, 21 Ark., 539; *Stevens v. Thompson*, 17 N. H., 103.

In these cases an equity is raised in favor of the tenant, who, from his own funds, in good faith improves and enhances the value of the common estate. In the case at bar the other tenants, by mortgage upon their own property, contributed to the raising of a fund much more than sufficient, if it had been properly applied, to make all the improvements placed upon the common estate. The fund was raised for the express purpose of making this improvement. W. H. Starr, having misapplied the fund, acquired no equity, as against his co-tenants, to be reimbursed out of their estate for the improvements in question. The principle invoked by appellees does not apply to this case.

IV. It is urged by appellees that the statute of 1876, relating to mechanics' liens, in so far as it provides a remedy, <sup>3. _____: pri-
ority of lien.</sup> is only declaratory of the powers of courts of equity, which they possessed independently of it, and that the court, prior to that statute, could order the building sold and removed as provided by the Code of 1873, or it could have taken an account of values and marshaled the securities, and sold the whole. The mechanic's lien is purely a creature of statute. If the statute did not authorize such lien it would have no existence. The statute not only creates the lien, but provides the manner of its enforcement. Where prior liens exist upon the real estate on which

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the improvement is erected, the only mode provided for enforcing the priority of the mechanic's lien against the improvement is by the sale and removal of the improvement. Code, §§ 2139–2141. It is a familiar principle of law that where a statute gives a right and creates a liability which did not exist at common law, and at the same time provides a specific mode in which such right shall be asserted and liability ascertained, that mode and that alone must be pursued. *Cole v. City of Muscatine*, 14 Iowa, 296. The authorities cited by appellees do not, we think, maintain the position for which they contend.

A number of the cases cited arose in Illinois under a statute very similar to our statute of 1876. In *Whithead v. Methodist Protestant Church*, 2 McCarter Ch. (N. J.), 135, a judgment had been recovered against the building in favor of the mechanics, and the plaintiff afterward brought a bill to foreclose under a prior mortgage. The validity of the liens was admitted, and the only question was how the relative values of the lot and the building should be determined. The case of the *Newark Lime & Cement Co. v. Morrison*, 2 Beasley Ch. (N. J.), 133, is substantially to the same effect.

The act under which these decisions were made provides for a sale of the building and lot, and that the deeds shall convey to the purchaser the building free from any former incumbrance on the land, and shall convey the estate in the lands which the owner had at any time subsequent to the commencement of the building, subject to all prior incumbrances. There was no provision for the removal of the building as in our statute. See Statutes of N. J., Act of 1853, chapter 189, § 11. It is apparent that, under this statute, it was proper to adjust the liens by sale of the premises and apportionment of the proceeds. Several other authorities are cited by appellees, but none of them, we think, maintain the broad proposition contended for, that under a statute such as ours equity may enforce the lien in a manner altogether different from and independent of that provided in the statute.

We are of opinion that, under the law existing prior to the act of 1876, the only manner of establishing the priority of a mechanic's lien upon a building, over a pre-existing incumbrance upon the land, was by the sale and removal of the building, and that, where the nature of the improvement is such that it cannot be removed, the lien of the mechanic must be postponed to that of prior incumbrances upon the land. This construction works no real hardship, for it is always competent for the mechanic or material man to ascertain from the records the state of the title before performing labor or furnishing material.

V. It is urged, however, that the referee erred in the conclusion of law that the facts set forth in the ninth finding of
 4. ———: com- facts do not constitute a commencement of the
 mencement of
 building. building within the meaning of the law, and that the building was in fact commenced before the mortgage was recorded. We think the conclusion of the referee upon this branch of the case is correct. In *Brooks v. Gester*, 3 Cal., 65, it is held that the commencement of a building under the mechanic's lien law is the first labor done on the ground, which is made the foundation of the building, and is to form part of the work suitable and necessary for its construction.

VI. W. H. Starr owned a life estate in the lots, and one-third of them in fee under section 2440 of the Code. By his
 5. ———: right contracts he could create a lien against the prop-
 of removal. erty only to the extent of his right and interest therein. He could not create any lien against the interests of his co-tenants. *McCarty v. Carter*, 49 Ill., 53; *Dutro v. Wilson*, 4 Ohio St., 101; *Johnson v. Drew*, 36 Cal., 628; *Baxter v. Hutchings*, 49 Ill., 116. The other tenants in common of the property, as we have seen, provided the means for making the improvement in question. When the building was erected they owned two-thirds of it, subject to the life estate of W. H. Starr. He, under the circumstances, as we have seen, had no equity against his co-tenants for reimbursement. To this interest of W. H. Starr, and to this interest alone, the

lien of the mechanics attached. In other words, the lien attached to W. H. Starr's life estate in the whole premises, and to his estate in fee in one-third thereof, subject to the mortgage executed to Trevor, and recorded prior to the commencement of the building.

VII. How is this lien to be enforced? The referee finds that the building is an original, independent structure—a brick building three stories in height, with stone foundations. It is very apparent that, as against his co-tenants, W. H. Starr had no right to remove this building. It is difficult to see how the mechanics, in virtue of a contract made with W. H. Starr, could acquire rights greater than he himself possessed. "The lien of a mechanic on a building is subordinate to the lien of a mortgage upon the land on which the building is erected, recorded before the building was commenced. When the interest which the owner of the building has in the land is that of a mere occupant, with a right to remove the building, the right of occupancy and removal would pass by a sale under the mechanic's lien; but if the owner of the building, as between himself and others having rights in the land, would not have power to remove it, a purchaser under the mechanic's lien would acquire no right to remove it." *Jessup v. Stone*, 13 Wis., 466. In this case the court say: "There are many buildings, the material and fabrics of which are such that to remove them is to convert them into a broken and worthless mass of ruins and fragments. We cannot believe that the Legislature intended to provide a remedy, the pursuit of which must in so many cases result in the almost total destruction of the thing sought."

In *O'Brien v. Pettis & Leithe*, 42 Iowa, 293, it was held that the right of removal depends upon the fact as to whether the building upon which the materials were furnished and work done is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain. In the case at bar the one-third interest of W. H. Starr is inseparably connected with

Rose v. Schaffner.

the two-thirds interest of his co-tenants. It also appears reasonably certain that the building could not be removed without materially injuring, if not almost altogether destroying, its value. The liens cannot, we think, be enforced through a removal of the building. The life estate of W. H. Starr has been determined by his death. The liens of the several mechanics must be established against the interest of W. H. Starr in the lot and building—the one-third thereof in fee, subject to the prior lien of the Trevor mortgage.

REVERSED.

ROSE V. SCHAFFNER ET AL.

1. **Conveyance: COVENANTS OF WARRANTY: MORTGAGE.** The mortgagee of real estate is entitled to the protection of the covenants of warranty under which the mortgagor purchased.
2. ——— : **EQUITABLE JURISDICTION.** R. purchased land from H. with covenants of warranty, and afterward executed a mortgage thereon to plaintiff. Through several intervening conveyances the title of R. passed to D., when it was found that the title acquired from H. had wholly failed, whereupon, in ignorance of the existence of the mortgage of plaintiff, H. paid to D. the amount of his liability on the covenant of warranty: *Held*, that in an action to foreclose the mortgage equity had jurisdiction to require D. to repay so much of the amount received as was necessary for the protection of H.

Appeal from Webster Circuit Court.

THURSDAY, APRIL 10.

ACTION in chancery to foreclose a mortgage. The Iowa Homestead Company appeals from a decree dismissing, upon a demurrer, its cross-bill filed against the other defendants. The facts of the case appear in the opinion.

Hubbard, Clark & Deacon, for appellant.

John F. Duncombe, for appellees.

Rose v. Schaffner.

BECK, CH. J.—In 1865 the Iowa Homestead Company sold and conveyed by deed of general warranty to L. K. Rose a quarter section of land, for the consideration of nine hundred and sixty dollars. Soon after the purchase and conveyance L. K. Rose executed a mortgage upon the land to plaintiff, R. S. Rose, to secure the payment of a promissory note for five hundred and fifty dollars. Subsequently to the execution of the mortgage L. K. Rose conveyed the land, and defendant Mary Schaffner acquired the title of Rose under two intervening conveyances, and afterward conveyed to defendant Duncombe. The title thus derived from the Iowa Homestead Company wholly failed, and thereupon Duncombe, representing that he held the title without incumbrance thereon, induced the company to pay him the amount of its liability upon its covenants of warranty in the deed to L. K. Rose, and thereupon executed to the company a quit-claim deed on account of the breach of its covenants of warranty. The money was paid by the homestead company to Duncombe under a mutual mistake of facts, neither party having actual notice of the mortgage executed by L. K. Rose to plaintiff, and both supposing no incumbrance had been put on the land. Duncombe paid a part of the money received of the company to defendant Schaffner, she being entitled thereto for some reasons based upon the facts of the case, and in settling with the company Duncombe acted as her agent, as well as for himself. The plaintiff's mortgage is wholly unpaid. The petition alleging the facts just stated makes the homestead company, Mrs. Schaffner and Duncombe, as well as the mortgagee, L. K. Rose, defendants, and prays that the mortgage be foreclosed, and that a judgment be rendered against the defendants. Recovery is sought against the company on the ground that the covenants of warranty in its deed to L. K. Rose enure to the benefit of the mortgagee, the plaintiff, who is entitled to the protection thereof to the extent of the debt secured by the mortgage, and Schaffner and Duncombe are claimed to be liable for the reason

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that they received payment from the company in discharge of its liability. An accounting it is prayed may be had between the defendants and plaintiff, and judgment may be rendered thereon.

The homestead company answered the petition. It will, in the progress of this opinion, be discovered that the allegations of its answer are not important, in the aspect which the case assumes, and are, therefore, not recited here.

Schaffner and Duncombe demurred to the petition of the plaintiff on the grounds that it shows no privity of contract between them and the plaintiff; that plaintiff has no claim against them until the mortgage be foreclosed, and that he must pursue his remedy against the mortgaged property and the mortgagee. The demurrer was sustained, and thereupon the homestead company filed its cross-petition against Schaffner and Duncombe, setting up and alleging all the facts we have above recited. It must be especially remembered that the cross-bill alleges the existence of the mortgage of plaintiff as a lien upon the land; that it is unpaid; the failure of the title in the homestead company; the payment of the money to Duncombe in discharge of the covenants of warranty in the deed under which all the parties claim, under the mistaken belief that there was no incumbrance on the land; the payment of a part thereof to Schaffner, and the release of the homestead company by Duncombe, by means of the execution of the quit-claim deed to the homestead company. It asks as relief that an accounting be had, and that the amount paid by the homestead company to Duncombe, and paid by Duncombe to Schaffner, be ascertained, and judgment be rendered against each for the amount so received—but the aggregate amount shall not exceed the amount due plaintiff upon his mortgage—and that such judgments be enforced for the payment of the amount found due plaintiff. General relief is also prayed for. A demurrer by defendants Schaffner and Duncombe to this cross-bill was sustained, and from the judgment thereon the homestead company appealed. It does not

 Rose v. Schaffner.

appear that the case upon plaintiff's petition for a foreclosure has been disposed of, and no appeal was taken by plaintiff from the judgment sustaining the demurrer of Schaffner and Duncombe to the original petition. The only questions in the case arise upon the court's ruling in sustaining the demurrer to the cross-bill of the homestead company. It becomes our duty to inquire into the correctness of that ruling.

II. It cannot be doubted that plaintiff, as the mortgagee, is entitled to the protection of the covenants of warranty in the deed of the Iowa Homestead Company under which the mortgage became a lien upon the land. We do not understand this proposition to be disputed by counsel for appellees. It is supported by decisions of this court. *Devin v. Hendershott*, 32 Iowa, 192; *Harper v. Perry*, 28 Iowa, 57.

III. The petition alleges that the homestead company paid the money to Duncombe in discharge of its covenants of warranty, under the mistaken belief that no incumbrance had been put on the land, being ignorant of the existence of plaintiff's mortgage. Duncombe had no actual notice of the mortgage. Surely the law will not permit Duncombe to keep this money, and hold the homestead company liable to pay the amount to plaintiff in this action upon the covenants of the deed. The mistake of the parties as to the fact of the non-existence of the mortgage is a sufficient ground upon which to base a right of recovery under familiar legal rules. We do not understand counsel of appellees to deny the liability of Duncombe and Schaffner, but they insist that this liability is purely legal, and a complete remedy may be had at law.

But mistakes whereby parties are deprived of their property or money have always been subjects of chancery cognizance, and remedies to relieve therefrom are never refused in that forum. While it is true that money paid by mistake may be recovered at law, and when no circumstances attend

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the case which will bring it within chancery jurisdiction the remedy must be sought at law, yet if, for any reason, the case is of equitable cognizance, the party will not be required to go to another forum to recover the money, but will have full relief in equity.

In the foreclosure action all the defendants were proper parties. The plaintiff seeks to hold the homestead company liable. That defendant, while not disputing its liability, shows by its cross-bill that Schaffner and Duncombe are liable to it on account of the payment made them, and ought, in good conscience, to protect plaintiff against liability on the covenants of warranty. As between the defendants this surely is true. It may be that the homestead company, by its cross-bill, could not delay the foreclosure. But plaintiff makes no objection on that ground; defendants can urge none. Equity assumes cognizance of the cross-bill for the simple reason that, as the homestead company has paid Duncombe a sum sufficient to discharge the covenants of warranty, for that very purpose, in good conscience and in equity, Duncombe ought to protect the homestead company by paying plaintiff's mortgage. This is the very equitable obligation which the homestead company seeks to enforce by the cross-bill. We are clearly of the opinion that it presents a case of purely chancery jurisdiction.

We think, too, that the cross-bill in this case is authorized by Code, § 2663.

IV. It is urged by counsel for the appellees that, until plaintiff's rights upon the mortgage are settled, recovery cannot be had against them. That is quite true. The cross-bill alleges that the mortgage is a subsisting lien and is unpaid. This the demurrer admits. In the case as it is presented to us it is admitted that plaintiff has a right to recover upon the mortgage. It is also said that the mortgagor may pay the mortgage. The pleadings show that he has not paid it; they contain nothing as to what he may do. But should it turn out that the plaintiff cannot, for any reason, recover on

Smith v. Eaton.

the mortgage, or the mortgagor should pay the mortgage, no decree in favor of plaintiff will be rendered against Duncombe and Schaffner, for in that case plaintiff will be entitled to no relief. There will be no difficulty in settling the rights of the parties by proper decree as they may be made to appear upon the trial.

The judgment of the Circuit Court is

REVERSED.

SMITH V. EATON ET AL.

1. **Homestead: JUDGMENT: MORTGAGE.** A judgment against the surviving husband is not a lien upon his homestead right in the lands of his wife, unless he shall have abandoned the same, nor can he create a valid lien thereon by the execution of a mortgage.

Appeal from Winneshiek Circuit Court.

THURSDAY, APRIL 10.

SARAH B. EATON was the owner in fee of certain real estate in Decorah, which she, with her husband, the defendant H. H. Eaton, occupied as a homestead. She died intestate February 21, 1876, without issue. The family consisted of the husband and wife only.

On the 25th day of May, 1876, the defendant, the First National Bank of Decorah, recovered a judgment against said H. H. Eaton for two hundred and twenty-seven dollars. An execution was issued on this judgment, and the said homestead was sold at sheriff's sale, the bank being the purchaser.

On the 5th day of October, 1876, said H. H. Eaton executed a mortgage upon said real estate to the plaintiff to secure the payment of the sum of seven hundred dollars. The property is described in the mortgage as follows: "The east one-half of lots 1 and 4, in block 32, in Decorah, Iowa—said premises being the homestead of the said H. H. Eaton."

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On March 21, 1877, said H. H. Eaton conveyed his interest in the property by quit-claim deed to one Zuckmeyer.

This action was commenced by B. F. Smith to foreclose his mortgage. It is averred in the petition that prior to the time of making plaintiff's mortgage the said H. H. Eaton was the head of a family, and occupied the mortgaged premises with his family as a homestead, and so continued to occupy the same up to the time of the rendition of the judgment in favor of the bank, and for a long time thereafter. A decree is prayed as against the bank establishing the priority of the mortgage over the said judgment and sheriff's sale.

The bank answered by denying that the premises in controversy were occupied by said Eaton as a homestead at the time of making the mortgage declared on, and averring that prior to the said sheriff's sale on the judgment in favor of the bank said Eaton had abandoned whatever homestead right he may have had, and had abandoned such right prior to the making of the mortgage to plaintiff. It is further averred in the answer that the lien of the judgment and sale thereunder is prior and superior to the lien of plaintiff's mortgage, and a decree to that effect is prayed.

The cause was tried to the court on written evidence, by order of the court, and a decree was entered declaring the lien of the mortgage to be superior to that of the judgment. The First National Bank appeals.

Brown & Wellington, for appellant.

E. E. Cooley, for appellee.

ROTHROCK, J.—I. H. H. Eaton, the mortgagor, was the only witness examined upon the trial in the court below. It appears from his testimony that after the death of his wife, and until the conveyance to Zuckmeyer, he did not intend to abandon his homestead right in the premises. His acts were consistent with such intention. He occupied a part of the dwelling-house until after he made the conveyance. Although

Smith v. Eaton.

he leased part of the premises, yet he retained one room and occupied the barn up to the last of October, 1876. Although in cross-examination, in answer to specific questions, he stated that he claimed the property as heir of his wife, still, we think, taking all his testimony with the claim in the mortgage describing the property as his homestead, a finding that he abandoned the homestead at any time before he made the conveyance would not be supported by the evidence.

II. The judgment in favor of the bank was prior in time to the execution of the mortgage. The judgment was not a

1. HOMESTEAD: lien upon the homestead right of the defendant.
judgment:
mortgage.

The mortgage, being merely upon the homestead right, was inoperative as a lien. It could not be a lien upon his distributive share or dower interest because he was occupying the property as a homestead, and could not enjoy both rights at the same time in the same property. *Meyer v. Meyer*, 23 Iowa, 359. His right of occupancy and possession under his homestead rights conferred no title to the property, and he could not execute a valid mortgage thereon. *Butterfield v. Wicks*, 44 Iowa, 310.

These considerations dispose of the lien claimed for the mortgage. It was invalid and created no lien.

III. We will now examine the question as to whether the bank had any substantial rights which were prejudiced by the decree. If it had no lien by virtue of its judgment it is not prejudiced. It must be remembered that neither of the alleged lien holders claim by their pleadings that Eaton had any other interest in the property excepting his homestead, or his right to his distributive share or dower as the survivor of his wife. This being the state of the record we think that the judgment was not a lien. The question as to whether the judgment was a lien upon that interest of the husband which he held as the heir of his wife, aside from his dower or distributive share, she having no children, is not presented in the record, and we do not determine it. What we do determine is that neither the mortgage nor judgment was a lien,

Stevens v. Stevens.

because the plaintiff claims that Eaton was holding the property as a homestead, and the bank claims that the homestead was abandoned, and based its lien upon that ground.

Finding that there was no abandonment, no right of the defendant is prejudiced by the decree, however erroneous it may be. *Wile v. Wright*, 32 Iowa, 451.

AFFIRMED.

STEVENS ET AL. V. STEVENS ET AL.

1. **Homestead : DOWER : SURVIVOR MUST ELECT.** The surviving husband or wife cannot enjoy at the same time both dower and homestead in the real estate of decedent, and must elect which of those rights he or she will take.

Appeal from Boone Circuit Court.

THURSDAY, APRIL 10.

THIS is an action of the heirs at law of Rebecca Stevens, deceased, for partition of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of section 24, township No. 82, range 27, and the north half of lot 5, section 22, township 82, range No. 26, being in all one hundred and forty acres of land. The court found that the plaintiffs and the defendant James Stevens are the owners in fee by inheritance from their mother, Rebecca Stevens, of the land above described, the interest of each being one-eighth part, and directed partition thereof accordingly. The defendant Elizabeth Stevens excepted and appeals. The material facts are stated in the opinion.

I. N. Kidder, for appellant.

Hull & Ramsey, for appellees.

DAY, J.—In 1858 A. C. Stevens was seized in fee and in possession of all the land in controversy. On the 6th day of January, 1858, A. C. Stevens made a deed to his son Henry, by which he intended to convey this land. There was a mistake in the deed by

50	491
80	308
50	491
398	45
50	491
115	300
5115	870
50	491
136	542
50	491
140	693

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which the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 24 was described as the S. W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. Henry Stevens took and retained possession of the land for two years, and on the 7th day of April, 1860, he conveyed it to his mother, Rebecca Stevens, the deed containing the same misdescription as that in the deed to him. The buildings were upon the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, being the west forty-acre tract. A. C. Stevens again moved on the land in 1865. His wife, Rebecca, died in January, 1873, seized of all the land. In November of that year A. C. Stevens commenced an action against all his children to confirm the title in him, alleging that the deed to Henry, and from Henry to his mother, Rebecca, was for the purpose of creating a trust, and that he was the actual owner of the land.

The defendants filed a cross-bill asking that the deeds be reformed and the misdescription corrected. By the judgment of the court in May, 1875, the petition of A. C. Stevens was dismissed. No entry was made of any action on the cross-bill to reform the deeds. In January, 1874, A. C. Stevens married the defendant Elizabeth Stevens. He remained in possession of all the land until the time of his death. In 1875 he erected a new dwelling, worth about five hundred dollars, upon the homestead forty. A. C. Stevens died in December, 1875. The defendant Elizabeth Stevens has been in possession of the homestead forty since her husband's death. Certain mechanic's liens upon the house were transferred to her, for which the court allowed her. The plaintiffs in this action ask that the mistake in the deeds may be corrected. No question is now made as to the mistake in the deeds, nor as to the power of the court to correct it. The only question presented is as to the right of the appellant Elizabeth Stevens to a homestead in the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section. Appellant concedes that A. C. Stevens was not entitled to both homestead and dower rights in the land of which his wife Rebecca died seized, and that if he had

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made no claim to any other portion of the land than the homestead, after his wife's death, he would then have been presumed to have made an election to hold the homestead, and the case would come within that of *Butterfield v. Wicks*, 44 Iowa, 310. It is insisted, however, that A. C. Stevens claimed all the land in his own right, paid taxes and made valuable improvements thereon after his wife's death; that he did not claim a homestead, but claimed a fee—the extent of the land in which the fee was held to be determined by law—and that this not having been determined during his life, should now be determined, and the appellant should be allowed a homestead therein.

It is true A. C. Stevens did claim all the land in his own right, until the suit which he instituted against his children was determined adversely to him, in May, 1875. The evidence shows that after that suit was determined he claimed the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section as his homestead and said he would hold it as such, and that his children could not get that. The evidence shows that at the time of the death of Rebecca Stevens the homestead forty was worth almost as much as the remaining eighty, so that, after the suit above named was determined against A. C. Stevens, he claimed much more than he was entitled to as dower. We think that A. C. Stevens elected to hold the west forty of the land in question as his homestead. His right therein was merely to use and occupy during his life. He had no title to the property. He had no interest therein which his widow, Elizabeth Stevens, could hold as a homestead after his death. Upon his death the property passed, by the ordinary rules of descent, to the legal heirs of his former wife, Rebecca. See *Butterfield v. Wicks*, 44 Iowa, 310.

The judgment of the court below is

AFFIRMED

RICHARDS ET AL. V. CRAWFORD ET AL.

1. **Mortgage:** DEED ABSOLUTE: STATUTE OF LIMITATIONS. A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations, and when so barred that an action for affirmative relief cannot be maintained thereon, it cannot be interposed as a defense to an action by the grantee to recover possession of the property.

Appeal from Howard District Court.

THURSDAY, APRIL 10.

THE facts in this case, so far as material to the questions involved, are as follows:

In April, 1857, the defendant Henry Crawford bought a land warrant and borrowed some money of the partnership firm of Taylor, Richards & Burden, for which he gave his promissory note for two hundred and ninety-four dollars, payable in one year. To secure the payment of said note he executed and delivered to John W. Taylor, one of said firm, a general warranty deed for one hundred and sixty acres of land. At the same time the said Taylor, Richards & Burden executed and delivered to said Henry Crawford an agreement in writing, binding themselves to reconvey said premises to said Crawford, upon the payment of said note. In November, 1871, Henry Crawford made deeds of conveyance of said land to the defendant John H. Crawford. In April, 1864, said John W. Taylor conveyed the premises to George Burden, one of said firm of Taylor, Richards & Burden.

March 13, 1866, Burden made a quit-claim deed to Richard Babbage. July 24, 1876, Babbage made a quit-claim deed to B. B. Richards and George Burden, members of the firm of Taylor, Richards & Burden.

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105	400
50	494
122	591

50	494
137	54

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In 1872, the defendant John H. Crawford commenced an action against Richards & Burden *et al.*, in the court below, in which he averred that he was the owner of said land, and that the conveyance from Henry Crawford to said Taylor, and the said bond for a deed, were one transaction, and made only as a mortgage to secure the payment of said note. He prayed that an account might be taken of the amount due on the note, and offered to pay said amount, and asked that all the deeds be cancelled, and for a decree establishing his title to the land. To this petition Richards & Burden, among other defenses, pleaded the statute of limitations. Upon a trial to the court a decree was rendered for said John H. Crawford, and he deposited with the clerk of said court the amount which by the decree was found necessary to redeem the land.

Richards & Burden appealed said cause to this court, where it was held that said John H. Crawford's right to maintain the action to redeem was barred by the statute of limitations, and the decree of the District Court was reversed. See 42 Iowa, 260. No formal decree was entered in this court, and no further action has been taken in that case in the District Court. After the reversal of the decree said Crawford withdrew the money which he had deposited with the clerk in redemption of the land.

On the 24th day of July, 1877, Richards & Burden commenced this action against said John H. Crawford and Henry Crawford, for the possession of the land, averring that they were the owners thereof in fee simple.

The defendant John H. Crawford answered, averring that said deed from Henry Crawford to said Taylor, in connection with the bond for a deed, constituted a mortgage only, and alleging substantially the same facts in regard thereto that he did in his petition in the other action. The said answer further sets forth that plaintiffs refused to receive said redemption money, and avers a readiness and willingness to

Richards v. Crawford.

pay the same, together with all taxes paid by plaintiffs on said land.

The plaintiffs replied to this answer by setting up the record in the former action as an adjudication of the rights of plaintiff in the land.

There are other questions presented by the abstract, as to the rents and profits of the lands, and improvements thereon, which, in the view we take of the case, need not be particularly referred to. There was a trial by the court, and a judgment that plaintiffs are the legal owners by title in fee simple absolute of said premises, and that they have and recover immediate possession thereof. Defendant appeals.

H. T. Reed, for appellant.

E. E. Cooley, for appellee.

ROTHROCK, J.—The action of *J. H. Crawford v. Richards & Burden*, 42 Iowa, 260, was between the same parties and in the same rights as the action at bar. What-
1. MORTGAGE:
deed absolute. ever rights of the parties were adjudicated in that action were settled forever, and cannot now be disturbed. It was there determined that, although the conveyance from Henry Crawford to Taylor was intended as a mortgage, yet by reason of the statute of limitations Crawford could not redeem. The legal effect of the adjudication was that, by reason of the bar of the statute, Crawford was precluded from showing that the deed of warranty was intended as a mortgage. In what better position he can be by pleading the same facts as an equitable defense to the plaintiff's action for the possession of the land we are unable to determine. It must be remembered that this is not a statutory mortgage. It is in form a deed in fee simple absolute. An action for the possession of the land could have been maintained upon it, subject to the defense which equity allows to be interposed, that it, with the bond, was intended merely as a mortgage.

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This defense is in its nature affirmative, and if an action to redeem could not be maintained by reason of the statute of limitations, neither can the defense.

The doctrine of the cases relied upon by counsel for defendants is that the rights of the parties are the same, whether the mortgage be such in form, or in the form of a conveyance of the legal title. This may be admitted, with this distinction, however: By a statutory mortgage the legal title remains in the mortgagor. By a conveyance of the legal title to secure the payment of money the grantor reserves the right in equity to redeem the property, and against an action at law for the possession of the land he may interpose his equitable defense. *Burdick v. Wentworth*, 42 Iowa, 440. That the legal title was vested in Taylor by the conveyance from Henry Crawford, must be regarded as settled in this State. *Farley, Norris & Co. v. Goocher*, 11 Iowa, 570; *Burdick v. Wentworth*, *supra*. The legal title must prevail unless the equitable defense is interposed. It having been adjudged in the former action that Crawford's right to redeem is barred by the statute, that judgment is an end of the controversy.

AFFIRMED.

GRAY V. MCCALLISTER ET AL.

1. **Tort: ASSIGNMENT OF CLAIM.** A claim based upon a personal tort, which dies with the party, may be assigned or transferred like any other cause of action.
2. ———: ———: **EQUITIES.** The assignee of such claim, who is a creditor of the assignor, is not postponed to the holder of a judgment against the assignor; nor are his equities inferior to those of the judgment creditor.
3. **Assignment: BONA FIDES: PREFERENCE.** An assignment of his property by a debtor in good faith, preferring certain creditors, is not invalid.

Gray v. McCallister.

Appeal from Keokuk District Court.

THURSDAY, APRIL 10.

On the 26th day of September, 1877, the defendant McCallister, as plaintiff in an action for malicious prosecution, recovered against J. D. Gray and the defendant in this action John Marquis, a judgment for one thousand two hundred dollars and costs of suit, in the Circuit Court of Washington county. In this action the defendants Farley & Kelley were attorneys for the plaintiff, William McCallister.

On the 17th day of October, 1876, F. Linstadt recovered a judgment in the District Court of Des Moines county against Marquis & McCallister, John Marquis and William McCallister, for one thousand four hundred and sixteen dollars and seventy-three cents, and costs.

On the 28th day of November, 1876, this judgment was assigned to J. D. Gray, without recourse, by the attorneys of record of Linstadt, Gray having paid to them the full amount of the judgment.

On the 26th day of September, 1877, the plaintiff commenced this action in equity, in the Washington District Court, praying that so much of the judgment in the case of *Linstadt v. McCallister & Marquis*, assigned to plaintiff, as may be necessary, be set off against the judgment of McCallister against the plaintiff, and that said judgment be cancelled.

The petition alleged that the firm of McCallister & Marquis was wholly without partnership funds or means to pay the judgment, that McCallister is wholly insolvent, and that John Marquis is of doubtful solvency.

On the 19th day of November, 1877, a change of venue was ordered to the Keokuk District Court.

The defendant McCallister answered, admitting that he recovered a judgment against plaintiff and the defendant Marquis, as claimed, and alleging in substance that the defendants Farley & Kelley have a lien thereon for six hundred

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dollars for attorney's fees, and for one hundred and five dollars for past services; that defendant McCallister, on the 20th day of September, 1877, assigned the balance of said judgment to R. P. Kelley, for the payment to Kelley of one hundred and thirteen dollars and fifty-five cents, and that the balance of said judgment was to be applied to the payment of claims filed with Kelley against defendant; that the judgment in the Des Moines District Court was recovered against defendants McCallister and Marquis, as partners; that the judgment has been fully paid by Marquis, and that plaintiff, as agent and attorney of Marquis, and with the money of Marquis, paid said judgment, and had the same assigned to himself for the purpose of compelling defendants to pay the same; that the judgment has been satisfied so far as all parties are concerned except the members of the firm; that there has never been a settlement between the partners of said firm, and a fair settlement would show Marquis indebted to the defendant McCallister.

The defendants Farley & Kelley answered, alleging that they are entitled to a lien on said judgment substantially as set forth in the answer of McCallister.

R. P. Kelley filed a petition of intervention, alleging that on the 20th day of September, 1877, the defendant McCallister assigned to him, in writing, his interest in the judgment recovered against Gray & Marquis, to pay certain notes made by McCallister to R. P. Kelley for one hundred and thirteen dollars and seventy-three cents, and the balance to be applied to the payment of certain other debts and claims owing by McCallister, amounting to five hundred and fifty-eight dollars. The cause was tried by the court. The court found in favor of the defendants and intervenor, and dismissed the plaintiff's petition. The plaintiff appeals.

Donnell & Brooks and A. H. Patterson & Son, for appellant.

Farley & Kelley, for appellees.

Gray v. McCallister.

DAY, J.—The facts in this case are substantially as follows:

On the 17th day of October, 1876, F. Lindstadt recovered a judgment against John Marquis and William McCallister, both as members of a firm and as individuals, for one thousand four hundred and sixteen dollars and seventy-three cents, with an award of special execution against property attached therein, of the value, as shown by the evidence, of from two thousand five hundred to three thousand dollars. The defendant John Marquis procured a release of the personal property attached by the execution of a delivery bond. It does not appear that the real estate attached has been released.

On the 28th day of November, 1876, this judgment was assigned to plaintiff. McCallister is insolvent, and it seems that Marquis has no property subject to execution.

Some time in September, 1876, the defendant McCallister employed the defendants Farley & Kelley to bring an action for malicious prosecution against Gray & Marquis. It was verbally agreed that they should receive as a contingent fee one-half the judgment obtained, and if McCallister settled before trial they were to have one-half the amount he obtained. McCallister was to pay the costs.

In the latter part of September, 1876, McCallister verbally assigned his cause of action against Gray & Marquis to R. P. Kelley, to secure Farley & Kelley in the sum of one hundred and five dollars—Farley in the sum of thirty-five dollars, the balance to be applied on other claims against McCallister. The action for malicious prosecution was not commenced against Gray & Marquis until some months after this arrangement was made, but the record does not show the exact time of the institution of that suit. At the time this verbal arrangement was made the Lindstadt judgment had not been recovered. The attorneys of McCallister, Farley & Kelley, first learned that Gray held the Lindstadt judgment two or three days before the written assignment to them of the

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judgment in *McCallister v. Gray & Marquis*, when Gray attempted to use the Linstadt judgment as a set-off in that action, which he was not permitted to do.

From the evidence it appears that McCallister did not personally know that Gray held the Linstadt judgment until after he had executed the written assignment of the judgment recovered by him against Gray & Marquis.

The verbal assignment of the cause of action to Kelley had no reference to the Linstadt judgment, but was made to prevent Gray from absorbing whatever judgment might be recovered in satisfaction of judgments which he might recover in actions brought upon notes executed by McCallister & Marquis, from liability upon which McCallister was ultimately released. Just before the verdict was returned in *McCallister v. Gray & Marquis*, the defendants Farley & Kelley filed notice of an attorney's lien, as follows:

"To William McCallister, John Marquis, J. D. Gray, and all others interested: You are hereby notified that Farley & Kelley claim and have a lien upon the cause of action, and judgment to be rendered in the case of *William McCallister v. John Marquis and J. D. Gray*, Circuit Court of Washington county, September Term, 1877, to the amount of one-half of the same, not to exceed one thousand five hundred dollars.

"Signed September 21, 1877.

"FARLEY & KELLEY."

On the same day William McCallister executed a written assignment as follows:

"I this day assign, transfer and set over all my right, title and interest to and in the cause of action and judgment in the cause of action above, in the Circuit Court of said county, September Term, 1877, to R. P. Kelley, to pay my indebtedness to R. P. Kelley, Farley & Kelley, D. McFarlane and others, so far as the same shall go after paying R. P. Kelley, Farley & Kelley, and McFarlane.

"WILLIAM MCCALLISTER."

Gray v. McCallister.

The claims referred to in the above assignment, in the hands of R. P. Kelley, amount to six hundred dollars and ninety-one cents, which, in connection with Farley & Kelley's lien, exhaust the judgment.

I. It is claimed that "the defendant McCallister, who was plaintiff in the judgment recovered against this plaintiff and Marquis in the Washington District Court, was not the real party in interest, either at the time said judgment was rendered, nor at the time the prosecution was commenced." If this be true we do not see how it can possibly aid the plaintiff. The plaintiff brings this action to have the judgment which McCallister recovered against plaintiff offset by one which plaintiff holds against McCallister. Now, if McCallister was not the real party in interest at the time the action was commenced, nor when the judgment was recovered, he does not hold the judgment in his own right, and the right of plaintiff to offset this judgment with one he holds against McCallister is at an end.

II. While it is conceded, under the doctrine of *Weire v. The City of Davenport and Plummer*, 11 Iowa, 49, that a claim based upon a tort may be sold or transferred if *bona fide*, yet it is claimed that this doctrine does not apply to personal torts which die with the party, and do not survive to his personal representative. Authorities are cited in support of this proposition. The Code, however, section 2525, provides: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same."

III. It is urged that the creditors to be benefited by this assignment, holding simply claims not reduced to judgment, should in equity be postponed to the rights of the plaintiff whose claim is in judgment. The plaintiff acquired no lien on the judgment in question in virtue of his judgment, and he has no equity superior to that of the other creditors of defendant. In *Weire v. City of Davenport*, 11 Iowa, 49, it was said that at common law a right of action

1. TORT: assignment of claim.

2. —: —: equities.

Gray v. McCallister.

for a tort may be sold or transferred so as to give the holder a priority over an attaching creditor of the transferee, and that neither the vendor nor the vendor's creditors could deny his title.

IV. It is claimed that the relief prayed by plaintiff should have been granted under the doctrine of *Hurst v. Sheets & Trussell*, 14 Iowa, 322. In that case it was held that courts of equity will set off mutual judgments when one of them has been assigned fraudulently by the party in whose favor it was rendered for the purpose of preventing such a set-off. The evidence in this case, we think, does not show that the assignment was made with such fraudulent purpose. The verbal assignment was made before the Linstadt judgment was recovered, and the evidence shows that McCallister did not personally know that plaintiff held that judgment when the written assignment was executed, although in law he was probably affected with the knowledge which his attorneys possessed. The assignment does not seem to have been made for the purpose of preventing a set-off of the two judgments. Although McCallister is insolvent it does not appear that the assignment embraced all his property. Upon the contrary the evidence shows that he owned some real estate, attached in the Linstadt proceeding, not embraced in the assignment. The transaction appeared, from the evidence, to be nothing more than a partial assignment of the debtor's property, in good faith, preferring certain of his creditors. Such an assignment is not invalid. See *Cole v. Dealham*, 13 Iowa, 551. Besides, the equities of the plaintiffs are not of the most persuasive character. As was before said, in the Linstadt proceeding property of the value of from two thousand five hundred dollars to three thousand dollars was attached. Marquis released his personal property by executing a delivery bond. Real estate of McCallister was attached. No real effort has been made to subject the attached property to the payment of the judgment. Upon the contrary an execution was ordered out, and was afterward returned by order of the

Walker v. Beaver.

plaintiff. We think, under all the facts established by the evidence, the judgment of the court below is right.

AFFIRMED.

WALKER ET AL. V. BEAVER ET AL.

1. **Evidence : DEED : PRACTICE.** Where, after amendment, a tax deed was admitted in evidence, which had been rejected before the amendment was made, *held*, that the rejection of the deed in the first instance did not constitute error of which advantage could be taken.
2. **Practice in the Supreme Court : TRIAL DE NOVO.** A case will not be tried *de novo* in the Supreme Court unless all the evidence in the case is presented on appeal and so certified by the trial judge.
3. ——— : **STARE DECISIS.** Prior decisions of the court will not be reconsidered upon objections of counsel without argument.

Appeal from Worth District Court.

THURSDAY, APRIL 10.

ACTION in chancery to quiet the title of certain lands. The relief sought by plaintiffs was refused, and the title of the lands was declared to be in the defendant. Plaintiffs appeal. The facts of the case appear in the opinion.

C. C. Cole, for appellants.

Butler & Bro. and Wright, Gatch & Wright, for appellees.

BECK, CH. J.—I. The plaintiffs claim title to the lands in controversy under tax sales and deeds made thereon. The defendant Mitchell, who alone appears to claim the land involved in the action since the appeal, claims the land under patent from the government, and alleges in his answer that there was a fraudulent combination at the tax sale to prevent competition; that, while the deed recites the land was sold at an adjourned sale, no adjournment was had; that the sale was illegal because made upon a holiday, the 25th of December; that the sale of all the land was *en masse*,

Walker v. Beaver.

and that the county treasurer making the sale was the agent of the purchaser. Of all these things, it is averred, plaintiffs had full notice.

By an amendment to the petition plaintiff alleges that the sale was held on the 25th day of December by regular adjournment from the first Monday of October, and that through mistake the deed was made to recite that the sale was begun and held on the 25th of December. The treasurer of the county was made a defendant, and the amended petition prays that the mistake be corrected.

II. The first error complained of is the refusal of the court to admit in evidence the tax deeds under which plaintiffs claim. The record does not sustain the fact
1. EVIDENCE: deed: practice. upon which the objection is based. It appears that the amendment to the petition above referred to was made after the trial began. The court having rejected the deeds, the amendment making the treasurer a party and averring the mistake was made to meet this ruling. Thereupon the deeds were offered and received in evidence, the court holding them admissible on the ground that plaintiff proffered to introduce evidence for the purpose of correcting them. The deeds were in fact admitted in evidence, and plaintiff took no exceptions to the manner of their admission.

But counsel for plaintiff insists that the deeds were admissible in evidence without the amendment to his petition; that they ought to be construed to recite that the sale was regularly adjourned, and that the deeds themselves raise the presumption that the sale was made at a proper time. All this may be true. But it appears that the plaintiff abandoned these positions in the court below, or at least did not rely upon them, and by amending his petition so as to meet the rulings of the court pursued another course, and sought to show the mistake in the deeds and secure its correction. In this manner he secured the admission of the deeds in evidence under the issues of his amended petition. He surely cannot,

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upon appeal, abandon the course he adopted in the court below.

But the deeds were in fact admitted in evidence, and they can be considered for the purpose of establishing any facts for which they are competent. If they have the force claimed for them by counsel, the plaintiffs will have their full benefit.

III. The plaintiffs insist that the decree of the court is not supported by the evidence. The cause is not triable here *de novo*. No order at the appearance term was made for trial upon written evidence, as required by Code, § 2742. (The case was tried before the enactment of chapter 145, Acts Seventeenth General Assembly). We have repeatedly held that compliance with this provision is necessary to secure trials *de novo* in this court. Our decisions on this point are many, and familiar to the profession.

IV. The plaintiffs insist that the cause is triable *de novo* here, but present it upon errors assigned upon the record. These alleged errors call in question the sufficiency of the evidence to support the decree. But it is not made to appear that we have before us all the evidence. We cannot, therefore, question the correctness of the decision of the court below.

2. PRACTICE in
the supreme
court: trial *de*
*nov*o.

The judge certifies that "the transcript from the reporter's minutes of the evidence is substantially full and complete, and, to the best recollection of the judge, is all the evidence received on the trial of the cause." It is very plain that we cannot review the decision of the court below unless we have all the evidence. The presumption in favor of its correctness will supply any deficiency of proof unless all the testimony be before us. It will not do to give us evidence "substantially full and complete," "to the best recollection of the judge." The law is not administered in such uncertainty. In the great number of cases that come before us for trial *de novo*, the parties have no trouble in preserving and bringing here *all* the evidence, without doubt or question as to its completeness. There would be no safety in a rule which in any case would permit

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us to try it upon the substance of the evidence introduced in the court below, according to the recollection of the judge.

We have refused to review the finding of the court below upon the substance of the evidence (*McKenzie v. Kitler*, 27 Iowa, 254), or upon what is certified to be "all the material evidence" (*Hubbard v. Epperson*, 40 Iowa, 408). The showing made by the certificate of the judge fails to assure us that we have before us all the testimony upon which the parties rested their case in the court below.

The plaintiffs present, as a part of the record, an affidavit of the short-hand reporter who took the evidence in the court below, stating that the record contains "a true and correct transcript of the testimony as taken by me," etc. It is sufficient to remark that this statement fails to show that we have *all* the evidence before us, without calling attention to the fact that the court, and not the reporter, is charged with the duty of certifying the evidence to this court.

Other questions raised by the plaintiff's assignment of errors are not discussed by counsel. We are, therefore, not required to consider them.

V. By the decree of the court the plaintiff recovered against defendants the amount, as found by the court, to which they are entitled on account of taxes paid, and interest, cost and penalties thereon. From this provision of the decree defendants appeal. It is in accord with our former decisions. Counsel object very strenuously to the correctness of these decisions on this point, and without giving us any light of argument ask us to reconsider them. We know of no reason why we should, upon counsel's invitation, imagine objections to these decisions and answer them, or proceed in the exploration of a new field of inquiry without the company and guidance of the learned counsel.

We discover no error in the case. The judgment upon both appeals is

AFFIRMED.

 Patton v. Bond.

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PATTON v. BOND.

1. **Contract: LEASE: CONSTRUCTION OF.** A contract for the lease of a farm provided that a failure to perform a certain condition before a time specified should work a forfeiture: *Held* that, the parties having voluntarily entered into the contract, the fact that the condition was a harsh one would not prevent a forfeiture upon non-performance.
2. ———: ———: **AGENCY.** The lessee claiming that he was released from liability for failure to comply with the condition, by one whom he alleged to be the agent of the lessor, whose authority was denied by the latter, the question of agency should have been left to the jury.

Appeal from Pottawattamie Circuit Court.

THURSDAY, APRIL 10.

ACTION at law. Verdict and judgment for plaintiff. Defendant appeals. The facts of the case involved in the questions decided are found in the opinion.

Sapp, Lyman & Ament, for appellant.

G. A. Holmes, for appellee.

BECK, CH. J.—I. The petition, as a cause of action, alleges that plaintiff leased of defendant a farm for one year, ending March 1, 1878, the rent payable in a part of the crops raised on the land, and that about the 1st of August, 1877, before the expiration of the lease, the defendant, without the consent of plaintiff, entered upon and took possession of the farm, converting to his own use the crops upon the land, the dwelling-house, etc.

The answer of defendant denies generally the allegations of the petition, and, as a special defense, sets up that defendant demised the premises to plaintiff for one year, ending March 1, 1878, by a written lease, which stipulated as follows:

“The said A. B. Patton is to have the use and occupancy of the same (the farm) for twelve months from date, on these

Patton v. Bond.

express conditions only: That he is to cultivate the ground well, is to plow not less than six inches deep in breaking for corn, and is not to let any amount of weeds go to seed on said premises, or any part of them; is to take good care of the dwelling-house and premises, and commit no waste or damage in any manner; is to take good care of the orchard, and not to skin or bruise the trees in plowing or working; is to clear up and haul out on to the field the manure of the premises occupied by the stable lot, and is to deliver to said N. J. Bond or his assigns, in Council Bluffs, two-fifths of all the oats raised, and one-third of all the corn raised on the premises, and is to deliver on the premises, stacked and inclosed, one-half of the Hungarian grass. Said Bond to furnish the oats and the Hungarian grass seed for seeding. And it is expressly understood that said Patton is not to gather or haul off any portion of the crop unless in the presence or by the consent of said Bond or his representatives, until the crop is divided and rent delivered, except sufficient for the use of said Patton's horses, cow and hogs, for his own use. It is further understood that no straw is to be sold or hauled off the premises, but the said Patton is to have what he wants for his own use, for team and cow or cows, and that the straw is to be inclosed. It is further agreed that the said Patton may use the down timber for cooking purposes or for one stove. The non-compliance with the above terms, or any part of them, shall work a forfeiture by the said Patton to the said premises or any part of them. And it is further agreed that the said Patton is to plow the stubble at least six inches deep, and not later than the 20th day of August. By stubble is meant the oat stubble, and a failure to do so shall work a forfeiture."

The answer alleges performance of the contract by defendant, and breaches of the conditions of the lease by plaintiff in the following language:

"Defendant says he has faithfully performed each and every of the covenants and obligations in said lease contained; but

Patton v. Bond.

he says said plaintiff has utterly failed to do so on his part, but committed breaches thereof in the following particulars, viz: * * * He allowed large quantities of weeds to go to seed on said premises; he failed to take good care of the dwelling-house and premises, but committed waste thereon and abandoned the same; he failed to clear up and haul out on to the field the manure of the premises occupied by the stable lot; he failed to deliver to the defendant or his assigns, in Council Bluffs, two-fifths of all the oats raised, one-third of all the corn raised on the premises, one-half of the Hungarian grass stacked and inclosed on the premises, or any other part thereof; he failed to inclose the straw, and he failed to plow the stubble, or in any manner or degree to fulfil the obligations and covenants of said lease on his part, whereby he forfeited all right under the same, in and to the subject-matter thereof. And it was only after such forfeiture and abandonment that said defendant took possession of said premises to save what he could and to prevent further waste, decay and damage."

The defendant sets up a counter-claim for damages sustained by him on account of the breach of the conditions of the lease by plaintiff. This part of the pleading need not be set out. The plaintiff in his reply admits the execution of the lease, and denies all other allegations of the answer. He further alleges that by parol agreement between the parties the orchard was excepted from the operation of the lease, and that when the instrument was executed defendant represented falsely that the farm was clean, fertile, and free from weeds, when in fact it was "unfertile, and foul with weeds," which was not discovered until plaintiff had plowed and planted the ground. Upon the issues raised by their pleadings the cause was tried, and a verdict rendered for plaintiff.

II. It will be observed that the lease provides that plaintiff shall plow the "oat stubble" at least six inches deep, not later than the 20th of August, and a failure to do so shall work a forfeiture of the lease. This condition of the contract

Patton v. Bond.

is in the plainest language, and a failure on the part of the plaintiff to perform, as it is expressed in explicit language, shall work a forfeiture of the lease. It is not for us to inquire into the purposes of the parties in introducing the condition, or to express the opinion that in this respect the contract is a harsh one. All we can say is: the parties voluntarily entered into the contract; they are bound by it, and must submit to the consequences provided for in case of its breach. But the court, in the second instruction given, enumerates the conditions of the lease to be performed by plaintiff; the condition requiring the plowing of the "oat stubble" is omitted. This was error. The jury were doubtless misled by the instruction into disregarding the evidence establishing the breach of this condition of the contract, as will presently appear. The breach of this covenant is set up in defendant's answer, and if established would authorize the jury to find that the defendant properly treated the lease as forfeited. They should have so been informed in the instruction.

III. The court directed the jury, in a subsequent instruction, that if, "at the time defendant took possession of the premises, the plaintiff had failed in any material and substantial part of the contract, which ought by that time to have been performed, * * * * this would have worked a forfeiture of the plaintiff's right to longer hold the premises, and defendant would have a right to take possession thereof." The evidence shows without dispute that when defendant took possession of the premises the "oat stubble" had not been broken. This was the last of August. Under the lease the plowing was to have been done not later than the 20th of August. The verdict is in conflict with the instruction, and is entirely without support of the testimony, which shows, without conflict, that when defendant took possession of the farm, about the last of August, plaintiff had failed to plow the "oat stubble," which should have been done before the 20th of August. The failure of plaintiff to perform this condition by express language of the lease wrought a forfeiture.

The State v. Houston.

The motion of defendant to set aside the verdict upon this ground should have been sustained.

IV. The evidence shows that the oats were cut by one Gaylord, who was in the employment of defendant, and plaintiff 2. —: —: claims that he was released from all liability for agency. failure to cut them by Gaylord, who was defendant's agent. The defendant asked the court to instruct the jury that defendant cannot be considered bound by the acts of Gaylord, unless "it be shown by a preponderance of proof that he had authority to do what he did." The instruction was refused. It ought to have been given, for the plainest reasons. Unless Gaylord was defendant's agent he would not be bound by Gaylord's acts. The question of his agency ought to have been submitted to and passed upon by the jury.

Other questions raised by counsel need not be discussed, as the judgment of the court below, for the errors pointed out, must be

REVERSED.

50	512
99	9
101	397

THE STATE V. HOUSTON.

1. **Criminal Law:** EVIDENCE: HUSBAND AND WIFE. Defendant's wife having testified against him before the grand jury which indicted him, it was *held* that objection could not be made thereto after conviction.
2. —: —. Nor could the fact that witnesses were examined on the trial whose names were not upon the indictment, be taken advantage of by objection first raised after conviction.

Appeal from Muscatine District Court.

THURSDAY, APRIL 10.

THE defendant was indicted for the murder of his wife's father, one Henry Kelly, and was convicted of murder in the second degree, and sentenced to the penitentiary for twenty-five years. He appeals.

Casey & Hobbs, for appellant.

No appearance for the State.

ADAMS, J.—I. Amelia M. Houston, wife of the defendant, was examined and testified before the grand jury. It is insisted by the defendant that that fact rendered the indictment void, and that the verdict cannot be allowed to stand. The wife cannot be a witness against her husband except in a criminal prosecution for a crime committed against her, and in a civil action brought by one against the other, but she may be a witness for him in all cases. Code, § 3641. When the grand jury have reason to believe that evidence within its reach will explain away the charge it may order such evidence to be produced. Code, § 4276.

A witness, then, called before the grand jury is not necessarily called against the defendant. It might be the defendant's privilege that his wife should be called. If, however, where a defendant's wife is called, and the facts of which she has knowledge are unfavorable to the husband, it would be proper for her to object to testifying, and we think she could not be compelled to testify against her objection. If she testified, and her testimony was unfavorable to her husband, so that it appeared that the indictment was found in whole or in part upon her testimony, possibly the indictment might be quashed upon that ground. But the defendant should judge whether her testimony was favorable or unfavorable before proceeding to trial, and move to quash if he thought there was ground for it. We think it too late to raise an objection of this kind after conviction.

II. Two witnesses were examined whose names were not on the indictment. The admission of their testimony is assigned as error. No objection, however, was made to their testimony at the time, and such objection cannot be raised for the first time after conviction. *Ray v. The State*, 1 G. Greene, 316.

III. The defendant asks that the sentence be reduced. The evidence shows that the defendant had become satisfied that his wife had contracted an improper intimacy with one Twigs; that he complained of her intimacy to her father, Henry Kelly; that her father told him that she was good enough for him if she ran with every man in Davenport, which was the place where the defendant and his wife were residing; that afterward the defendant's wife went to her father's house, at West Liberty; that the defendant followed; that he arrived at the house late in the evening and demanded admittance and admittance was refused; that he then requested to see his wife; that she declined to see him, on the ground that he had threatened her life, but told him that she would see him in the morning; that he then burst the door open and entered; that Kelly was in the room which was entered by the defendant, and upon the entry of the defendant ran into another room, probably for the purpose of escaping from the house, but being unable to escape that way returned, when the defendant struck him on the head; that Kelly then started for the door, and as he passed out the defendant shot him; that Kelly then went a few steps and fell upon the sidewalk; that while lying there the defendant shot him twice; that Kelly arose and fell again and died; that three bullet wounds were found in his body, either one of which was sufficient to produce death.

The evidence tends to show that the relations between the defendant and Kelly had been very unfriendly, and that on one occasion the defendant quarreled with him and knocked him down. It tends to show that the defendant loved his wife, and was in a great state of excitement on account of the supposed intimacy, and had threatened to commit suicide. We think, however, that there is little that can be said in extenuation of the killing of Kelly. Defendant had previously threatened his life. On the night of the murder he went to Kelly's house armed. There is no pretense that he armed himself for self-protection. We think his purposes were

White & Smith v. Savery.

wholly aggressive. Immediately upon his entrance he proceeded to murder Kelly, and without any immediate cause of provocation, so far as Kelly was concerned, except the mere fact that Kelly was harboring his own daughter, the defendant's wife, in his house, and did not open the door when the defendant demanded admittance. We do not feel justified in reducing the sentence.

AFFIRMED.

WHITE & SMITH V. SAVERY ET AL.

50	515
1125	38

1. **Partnership: INDEBTEDNESS TO PARTNER.** An action on a claim due a firm may be maintained in the firm name, although one of the partners may be entitled to the proceeds if the claim itself has not been applied to extinguish the debt due such partner.
2. ——— : **BAR TO ACTION.** The dismissal of an action on the ground that the plaintiff cannot maintain it in his individual name, is not a bar to an action for the same cause in the firm name.
3. **Trust: ACTION TO FORECLOSE.** Where a deed of trust was executed to secure advances to be made, and plaintiffs, among others, made such advances, *held*, that although parol evidence was necessary to show that plaintiffs had made the advances, yet it was competent for them to maintain an action to foreclose the deed of trust, the refusal of the trustees to do so being averred.

Appeal from Polk District Court.

THURSDAY, APRIL 10.

ACTION to foreclose a deed of trust executed by the defendants Savery and wife to secure an alleged loan of money. The defendants deny that any money was loaned; deny that the plaintiffs are the real parties in interest; plead a former adjudication and the statute of limitations. There was a judgment and decree for plaintiffs. Defendants appeal.

Wright, Gatch & Wright and J. B. Bissell, for appellants.

Phillips, Goode & Phillips, for appellees.

White & Smith v. Savery.

ADAMS, J.—I. The deed of trust was executed to secure a conditional obligation in writing drawn for the sum of sixty thousand dollars. It was a part of a scheme devised to raise money by loan from various individuals to secure the erection of a hotel in the city of Des Moines. The individuals proposing to loan money for such object, among whom were the plaintiffs, appointed three persons as their attorneys, agents or trustees, with power to receive their money and make such loan. The obligation for sixty thousand dollars was executed to these agents. No money, at the time of its execution, appears to have been loaned to Savery, but it was executed in contemplation that money would be loaned to him under the arrangement entered into, and it bound Savery for the repayment of such amount of money as should be received by him, with ten per cent interest, payable annually. The plaintiff White, among others, became a subscriber to the loan, and advanced to Savery, as it is claimed, and as we think the evidence shows, one thousand dollars through the said agents, and took their certificate to the effect that "he is the owner of one thousand dollars in said loan." The plaintiffs, White & Smith, as a firm, became subscribers to the loan, and advanced to Savery, as it is claimed, and as we think the evidence shows, one thousand dollars through the said agents, and took a similar certificate.

Afterward, in an action brought by one Sypher against the defendant to enforce the payment of a portion of the money secured by the deed of trust, the plaintiff Smith intervened, claiming to be the owner of the certificate issued to White, and also of the certificate issued to White & Smith. The court held that the evidence showed that White & Smith owned both certificates, and Smith's petition for intervention was dismissed without prejudice. The defendants now claim that whatever the evidence in that case might have shown, the evidence in this case shows that Smith was the owner and not the firm. They claim, also, that the plaintiff's petition shows the same thing. The evidence upon which they

White & Smith v. Savery.

rely is the testimony of White, which is to the effect that he has no interest in the action. The averment in the petition upon which they rely is that Smith is the real party in interest, and entitled to the proceeds and profits of the loan.

We will consider in the first place whether the plaintiffs must fail by reason of their averment. The petition shows elsewhere that the firm became the owner of the certificate issued to White, and so was the owner of both certificates. It does not show that either was sold, indorsed or otherwise transferred to Smith individually. The averment, then, that Smith is the real party in interest may be taken with the qualification that there was no sale, indorsement or transfer to him individually, and the averment with the qualification may be understood as indicating that, while there had been no such transfer as to divest the firm of its legal or equitable title, such was the state of the accounts between the partners that Smith was entitled to all the proceeds of the claim. Such appears to have been the real fact.

The evidence shows that the partnership of White & Smith was dissolved; that all the assets, including the claim in question, would necessarily be exhausted in discharging the obligations of the firm to Smith, and that the assets had been left in the hands of Smith for the purpose of paying him. He was the real party in interest, in the sense that he held and controlled the claim, and, as between him and White, was entitled to the proceeds of it. But as against Savery, White is a proper party plaintiff, because the claim had not been applied in the extinguishment of any part of the liability of the firm to Smith. To show that it had not been applied we refer to the testimony of Smith, who says:

"Whatever amount I may receive by way of recovery in this suit would apply on the indebtedness, according to the terms of the contract already set out."

The contract referred to is the contract of dissolution. It provides that Smith shall have control of the assets, and

1. PARTNER-
SHIP: indebted-
ness to part-
ner.

 White & Smith v. Savery.

"shall apply the proceeds thereof to the payment of partnership debts." No application could have been made of the claim, if there were still to be made an application of the proceeds. This view is in accord with *Sypher v. Savery*, 39 Iowa, 258 (266). Whatever apparent discrepancy there may be in the testimony we think can be easily reconciled.

II. The former adjudication pleaded is that which took place upon Smith's petition for intervention. But that petition having been dismissed merely upon the ground that he was not entitled to maintain an action in his individual name, the adjudication, we think, is not a bar to an action in the firm name.

III. The defendants maintain that the action was brought upon a parol contract, and was not brought within five years from the time the cause of action accrued, and is, therefore, barred by the statute of limitations. We think the action is brought upon the conditional obligation executed to the agents or trustees. The instrument is set out in the petition, and it is competent for the plaintiff to maintain an action upon it, if any person can, though not expressly named in it, it being averred in the petition that the agents or trustees refuse to bring the action. Indeed, we do not understand that any question is raised upon this point. The position taken by the defendants is that the action is not brought upon the instrument, but upon a parol contract, and that from the necessity of the case. The argument is that the instrument shows upon its face that it was given for advances yet to be made, and is, therefore, not evidence that any have been made. To show that they have been made parol evidence alone is relied upon. Therefore it is insisted that the action is brought upon a parol contract.

In our opinion the reasoning is not sound. The ground of action is the promise to repay. Proof of a loan might be made to raise an implied promise to repay in the absence of an express promise. In this case proof of a loan was necessary to bring the plaintiffs within the conditions of the express

White & Smith v. Savery.

promise, and make them a party to it; but, whether the promise be express or implied, it constitutes the ground of action. When it is expressed in writing the action should be brought upon the writing.

We come next to inquire whether the action is barred by the ten years' limitation. By the terms of the writing upon which we regard the action as brought the money was made payable in five equal annual payments, the first payment to be made in two years from the occupation of the building. The evidence shows that a portion of the building, to-wit: the portion designed for business rooms or stores, was occupied as early as 1858. But on the 22d of April, 1857, and before the money in question had been advanced, the agents of the subscribers to the loan entered into a written agreement with Savery whereby it was provided that, as some of the subscribers had failed to advance money according to their subscriptions, Savery should have the right to lease the business rooms of the building at any time, and that the loan should commence to draw interest only with the completion and occupation of that part of the building constituting the hotel; and that the principal of the loan should only be required in two, three, four, five and six years from such completion and occupation. As to when it was completed and occupied Savery testified in these words: "About one-half of the hotel part was not completed or occupied until the year 1866, about the first of the year." We do not find this testimony disputed. We may, then, regard the first installment as becoming due on the 1st day of January, 1868. It follows that no part of the claim is barred.

IV. The defendants complain of the admission in evidence of certain books of account to prove the loan of the money. If there were error in this we think it was without prejudice. White testifies positively to the loan, and his evidence does not appear to be contradicted. The fact of the loan, then, was established independently of the books.

V. Decree was entered June 27, 1877, for six thousand

The State v. Ray.

two hundred and eighty-seven dollars and fifty cents. It is insisted by the defendants that the amount is too large. By contract the money loaned was to bear ten per cent interest, and was, as we have seen, to commence bearing interest with the completion and occupation of that part of the building constituting the hotel, which was January 1, 1866. The interest was made payable annually, and the delinquent interest would draw interest. *Preston v. Walker*, 26 Iowa, 205. But the contract to pay interest upon delinquent interest being merely an implied contract, the delinquent interest would draw only six per cent simple interest. We find the amount due at the time the decree was entered to be five thousand and twenty-three dollars and twenty-three cents. The decree is, then, too large by one thousand one hundred and sixty-four dollars and twenty-seven cents, and it should be modified by the deduction of that amount.

MODIFIED AND AFFIRMED.

THE STATE V. RAY.

1. **Venue: CHANGE OF.** An abuse of discretion must be shown, in a refusal to grant a change of venue on account of prejudice of the judge, to constitute error.
2. **Criminal Law: BENCH WARRANT: JURISDICTION.** When a defendant voluntarily appears and submits himself to the jurisdiction of the court, the issuance of a bench warrant is unnecessary.
3. ———: **JUDGMENT.** The failure to render judgment for the payment of a fine until the term after the one when the defendant was convicted, was *held* not to constitute error.

Appeal from Decatur District Court.

THURSDAY, APRIL 10.

THE defendant was convicted and sentenced for the crime of keeping a nuisance, and now appeals to this court.

Peel v. Peel.

J. B. Morrison, for appellant.

No appearance for the State.

ADAMS, J.—I. The defendant moved for a change of venue on account of the prejudice of the judge. The motion was refused, and the refusal is assigned as error. We can see
 1. VENUE: change of. no evidence of abuse of discretion, and without such evidence the refusal to grant the change is not a ground of reversal. *State v. Mewherter*, 46 Iowa, 88.

II. The defendant was tried without the issuance of a bench warrant. It is insisted by the defendant that the court did not acquire jurisdiction of his person; but
 2. CRIMINAL law: bench warrant: jurisdiction. we think it did, if he appeared and submitted himself to its jurisdiction, in which case the issuance of a bench warrant was unnecessary.

III. The defendant was tried and convicted at the January Term, 1877. No judgment was rendered upon the verdict until the August Term of the same year,
 3. ———: judgment. when he was adjudged to pay a fine of one hundred and fifty dollars. It is insisted that the court could not render judgment after the term, but our attention is called to no statute or decision which supports the position. We discover no error, and the judgment must be

AFFIRMED.

50	521
134	478
134	479

PEEL V. PEEL.

1. **Divorce: ALIMONY: PRACTICE.** In an action for divorce by the wife, the failure of the husband to obey an order of the court directing the payment of alimony will only in extreme cases authorize the striking of his answer from the files.

2. ———: ———: ———. Where the wife is defendant the failure or refusal to comply with the order may very properly be punished by striking the petition or dismissing the case.

Peel v. Peel.

Appeal from Johnson Circuit Court.

THURSDAY, APRIL 10.

ACTION for divorce and alimony. There was a decree for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

Fairall, Bonorden & Ranck, for appellant.

Remley & Swisher, for appellee.

BECK, CH. J.—I. At the October Term, 1876, the court entered an order requiring the defendant to pay plaintiff fifty dollars as temporary alimony. At the following March Term the plaintiff moved to strike defendant's answer for the reason that he had failed to pay the money specified in the order for alimony. The failure of defendant was shown to the court, and thereupon he asked leave to show cause why he had failed to comply with the order, which was refused, and the motion to strike his answer was sustained. Thereupon the cause was tried upon the petition and testimony introduced by plaintiff.

II. The court, we think, erred in refusing defendant leave to show cause why he had not obeyed the order.

It does not follow, as a matter of course, that defendant was guilty of an intentional contempt of the court's authority by failure to pay the money as required by the order of the court. Misfortune, mistake, inability arising from disease of mind or body, or from poverty, if shown as the reason of non-payment, would surely have purged defendant from contempt. If not in contempt, there is no ground upon which a justification of the order to strike can be based. Surely equity will not close its ear to the honest party who shows his misfortunes or poverty as an excuse for failure to obey its order. It is never too late for a party, either in a court of law or chancery, to show that he is not chargeable with contempt.

1. DIVORCE: al-
imony: prac-
tice.

McCormick v. Basal.

While we are not prepared to hold that a defendant in a divorce case, failing or refusing to obey an order for payment of alimony, may in no case be lawfully visited with punishment by striking his answer, the authority should be exercised only in extreme cases, when other punishment cannot be inflicted or will not enforce obedience. It will not do to hold that the marriage relation may be dissolved on the ground of defendant's inability to pay a sum awarded as alimony, or because of his recusancy.

In case of a plaintiff who is ordered to pay a sum to enable his wife to resist his application for a divorce, disobedience 2. —: —: may well be punished by striking the petition or —. dismissing his case. The alimony in such case is allowed to enable his wife to establish her innocence. The dismissal of the action would not affect the rights or condition of the parties. In the case before us the striking of the answer resulted in a decree of divorce without a full investigation into the merits of the controversy.

For the error in refusing to permit defendant to show cause in excuse of his disobedience of the order for payment of alimony, the decree of the Circuit Court is reversed, and the cause is remanded.

REVERSED.

McCORMICK v. BASAL.

1. **Contract: CONSTRUCTION: WARRANTY.** Plaintiff having sold defendant a combined reaper and mower, with a warranty that if upon one day's trial it did not work well it should, upon notice thereof, be put in order, it was *held* that the purchaser was authorized to try it not only as a mower but also as a reaper, and that he was not bound to give notice under the contract until he had tried it for both uses.

Appeal from Winneshiek Circuit Court.

THURSDAY, APRIL 10.

In June, 1876, the defendant contracted with plaintiffs for one of their "Advance Combined Reapers." The contract

McCormick v. Basal.

was in writing, and contained the following warranty: "These machines are all warranted to be well made, of good material, and durable, with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormicks, or their agent, and allow time to send a person to put it in order. If it cannot be made to work well it will be taken back, and the cash payment refunded."

It is averred in the petition that the said machine was ready for delivery at the time and place specified in said contract, and was at that time delivered to and accepted by defendant; that defendant expressly renounced said contract, and that plaintiffs performed all the conditions precedent by them to be performed under the terms thereof; that by reason of said renunciation plaintiffs have been damaged in the sum of two hundred dollars, for which they ask judgment. The answer admits the making of the contract and the delivery of the machine, but avers that the same did not comply with the terms of the warranty in that it did not do good work; "that on the first and second days that defendant tried it, it did not do good work and could not be made to do good work; that plaintiffs were present on both of said days and they could not make the same work; that defendant gave immediate notice to plaintiffs' agent that it would not work, and said agent tried and could not make it work well, and after plaintiffs had two fair trials they refused to try more;" that thereupon defendant refused to have said machine and returned it. There was a trial by jury, and a judgment and verdict for the defendant. Plaintiffs appeal.

Willett & Willett, for appellants.

L. Bullis, for appellee.

ROTHROCK, J.—The plaintiffs requested the court to instruct the jury as follows:

"By the terms of the warranty defendant, if the machine

McCormick v. Basal.

did not operate well, after one day's trial was bound to notify
1. CONTRACT: plaintiffs that the machine did not operate well.
construction: The undisputed evidence is that the defendant
warranty. used this machine mowing grass over one day without giving
any notice to plaintiffs. Defendant had no right to rescind,
and you must find for plaintiffs for the amount agreed to be
paid."

The court refused this instruction and gave the following:

"The fact that the machine worked well as a mower would not, of itself, be a compliance with the warranty. It must also be made to work well as a reaper, or the defendant would be under no obligation to keep it, unless, as before stated, the failure to make it work was his (defendant's) fault."

It is urged that this action of the court was erroneous. We think the construction given to the warranty by the court's instruction was correct, and that the refusal to give that asked was not erroneous. It is true the defendant did mow grass with the machine for more than one day before he commenced to use it to reap grain. But his contract was not for a mower only—it was for a combined machine that would both mow and reap. It appears from the evidence that the machine, when used as a mower, has a four-foot bar, and when used as a reaper a five-foot bar, and the platform and rake-head are put on. A small pinion is used in mowing, and a larger one in reaping, because slower motion is required for reaping than for mowing. It would be an unreasonable and unfair construction of the contract to hold that the purchaser is without remedy upon the warranty because, before his grain was sufficiently ripe to reap, he mowed hay for more than one day. He was entitled to one day's trial of the machine with the reaping apparatus attached. There could have been no complete trial without a trial of all the parts and combinations in form to do the work for which the machine was warranted.

II. The court instructed the jury that in order to justify the defendant in repudiating the contract it must appear

Cooley v. Osborne.

from the evidence that he used reasonable skill and diligence in operating the machine. It is insisted that the verdict is contrary to the evidence and this instruction, because the undisputed evidence is that the design of the machine was that the driver of the team should ride upon the machine; that defendant was so informed and refused to ride, and if the machine failed to work well it was by reason of such refusal.

It is true the agents of plaintiffs testify that the machine will not work well unless some one rides in the driver's seat, and that defendant refused to ride. But other evidence shows that one Johnson, plaintiffs' agent, was present the greater part of the first day, and that his business there was to make the machine work well; that he said the machine did not work well, and that he would send some one up next day to fix it; that Johnson got on the reaper himself, and was more than an hour trying to get around a certain piece of grain; that another agent appeared next day and the machine worked no better. Considering this and other evidence in the case, we think the jury were fairly warranted in finding that the failure of the machine to work was not attributable to any act or want of diligence on the part of the defendant.

AFFIRMED.

COOLEY V. OSBORNE ET AL.

1. **Referee: FINDING OF FACT.** The finding of fact of a referee in a law action stands as the verdict of a jury.
2. **Statute of Frauds: AGREEMENT TO CONVEY.** An agreement to foreclose a mortgage and convey the land acquired thereunder to another is not within the statute of frauds and may be proved by parol.
3. **Contract: CHAMPERTY.** An agreement by a mortgagee that he would foreclose a mortgage executed for his protection as surety, and authorize the sheriff's deed to be made to the payee of the note upon which he was surety, in consideration that he should be released as such surety, and be reimbursed for a certain sum he had already paid on the note, was *held* not to be champertous.

Cooley v. Osborne.

Appeal from Mahaska Circuit Court.

THURSDAY, APRIL 10.

THIS is an action upon a promissory note for the sum of one hundred and fifty dollars, executed by the defendant to plaintiff.

The answer alleges that there has been a former adjudication of the matters herein, for that the plaintiff commenced an action on the note in controversy, against the defendants, before David Clammer, a justice of the peace of Monroe township, Mahaska county, and on the 30th day of April, 1875, judgment was rendered in favor of defendants on the merits, and against the plaintiff for the costs. The answer of the defendants further alleges: "That the defendants McCann and Taylor signed said note as sureties; that the said McCann has paid eighty-five dollars and fifty cents on same; that said McCann and Taylor held a mortgage on the premises sold by said Cooley to Osborne to secure them for signing said note; that it was agreed about May, 1876, between plaintiff and defendants McCann and Taylor, that they should foreclose said mortgage, and by process of foreclosure, pursuant to said agreement, cut the rights of said defendant Osborne out of said premises, and that Cooley would take the mortgage and pay them the eighty-five dollars and fifty cents, paid, and release them from further liability, wherefore defendants ask judgment for costs."

The cause was referred to F. M. Davenport. Pending the trial before the referee the defendants filed an amendment to their answer as follows:

"Now comes defendant and tenders the sheriff's certificate of purchase of lot 2, block 4, Indianapolis, Iowa, to plaintiff, and hereby authorizes the sheriff to make a deed to plaintiff, as provided by law, upon the payment to him for the defendants of the sum of eighty-five dollars and fifty cents, and interest thereon at six per cent to the date of payment,

Cooley v. Osborne.

from the 9th day of December, 1874. This tender and certificate to remain in court until the payment of said eighty-five dollars and fifty cents, and interest, by plaintiff."

The referee made the following report:

"1. That on the 14th day of July, 1873, the defendant J. A. Osborne executed his note to the plaintiff, with his co-defendants, E. H. McCann and Amos Taylor, as sureties, for the sum of one hundred and fifty dollars, due in twelve months after date, with interest at the rate of ten per cent per annum from date.

"2. That said note was executed for a part of the purchase money of an undivided one-half of lot 2, in block 4, in the town of Indianapolis, Iowa; and to secure the said McCann and Taylor against loss by reason of signing said note as sureties, the said J. A. Osborne executed a mortgage on the above described real estate, and delivered the same to them as indemnity against liability on said note.

"3. That on December 9, 1874, the defendant McCann paid on said note eighty-five dollars and fifty cents, and the same was indorsed as a credit on the same.

"4. That on the 20th day of April, 1875, suit was brought on said note by plaintiff before David Clammer, J. P., and on the 30th day of April, 1875, said cause was set for trial, and said defendants McCann and Taylor appeared and pleaded as a defense to said suit a want of consideration for the note, and that the title to the real estate for which said note was given was not transferred by the deed executed by plaintiff therefor, and upon said plea being entered in said cause judgment was entered for defendants, and against the plaintiff for costs of suit, taxed at five dollars and forty cents.

"5. That on or about the — day of May, 1876, it was agreed between plaintiff and McCann, defendant herein, that said McCann would foreclose the mortgage executed by defendant Osborne to him, as surety, on this property for which this note was given, and sell the property under the foreclos-

Cooley v. Osborne.

ure, and authorize the sheriff to make the deed to plaintiff; or, if McCann should buy in the property at sheriff's sale, he should make a deed to plaintiff, and upon so doing plaintiff should pay back to said defendant the eighty-five dollars and fifty cents which he had paid, with interest at the rate of six per cent per annum from the date of the payment by said McCann, and surrender the note sued on in this cause.

"6. That in pursuance of said agreement said McCann proceeded to foreclose the mortgage above referred to, and did foreclose the same, and said property was sold under the decree of foreclosure entered in said suit, and was bought in by said McCann, who received a certificate of purchase of the same, and he now tenders the same in court for the use of said plaintiff, on complying with his part of said agreement; and on his complying with said agreement the sheriff is authorized to execute a deed to plaintiff for said property instead of to the defendant McCann.

"As conclusions of law from the foregoing facts I find:

"1. That defendants in this suit are not liable in any sum whatever on said note sued on in this action.

"2. That defendants are discharged from liability on said note by reason of the agreement made in May, 1876, between McCann and plaintiff.

"3. That there has not been a former adjudication of the matters in this suit, because it does not appear that a trial was had on the issue formed in the cause before David Clammer, justice of the peace. I therefore recommend the court to render judgment against the plaintiff for costs of this suit."

The plaintiff filed exceptions to the report of the referee, and moved to set it aside. The defendants moved the court to confirm the report of the referee, and enter judgment thereon. The court overruled the plaintiff's motion and sustained the defendants' motion. The plaintiff appeals.

Williams & McMillen, for appellant.

Bolton & McCoy, for appellees.

Cooley v. Osborne.

DAY, J.—I. One of the grounds of exception to the report of the referee, and of the motion to set it aside, is that the facts reported are contrary to the pleadings. It is now claimed that there is a total variance between the pleadings and the proof. It is claimed that the answer simply alleges that Cooley was to take the mortgage, whereas the defendant introduced evidence, and the referee found that McCann was to foreclose the mortgage, executed by defendant Osborne to him as surety, and sell the property under the foreclosure, and authorize the sheriff to make a deed to plaintiff; or, that if McCann should buy in the property at sheriff's sale, that he would execute a deed to plaintiff therefor. The answer alleges that it was agreed between plaintiff and defendants McCann and Taylor that they should foreclose the Osborne mortgage, and by process of foreclosure cut the rights of said defendant Osborne out of said premises; and that Cooley would take the mortgage and pay them the eighty-five dollars and fifty cents paid, and release them from further liability. The allegation that Cooley was to take the mortgage after foreclosure of the same can mean nothing else than that he was to be subrogated to the rights of the mortgagees after sale; in other words, that he should be entitled to the sheriff's deed. The defense is not pleaded with technical exactness, and, upon motion, might have been required to be made more specific and certain; but there is, we think, no substantial variance between it and the proof and the facts reported by the referee.

II. It is claimed that the contract is unilateral and without consideration; that McCann agreed to do nothing, and that there is nothing in the report of the referee or in the evidence to show that McCann agreed to procure title and convey the same to Cooley.

The referee finds that it was agreed that "McCann would foreclose the mortgage executed by defendant Osborne, and sell the property under the foreclosure, and authorize the sheriff to make the deed to plaintiff; or, if McCann should

Cooley v. Osborne.

buy in the property at sheriff's sale, he should make a deed to plaintiff." This finding clearly shows an agreement on the part of McCann. The finding is not without evidence to support it. This is a law action, and the report of the referee stands as the verdict of a jury.

III. It is claimed that the contract testified to by McCann is within the statute of frauds, in that the testimony of this witness tends to establish a verbal agreement on the part of Cooley to buy real estate, no part of the purchase money being paid. The case falls within the principle of *Bannon v. Bean et al.*, 9 Iowa, 395, and under the doctrine of that case the contract found by the referee to exist is not within the statute of frauds. •

IV. It is urged that defendants have placed it out of their power to carry out the contract alleged in the answer, because they have merged the mortgage in a judgment for eighty-eight dollars, while the mortgage was given to secure the defendants McCann and Taylor from liability upon a note which amounted, principal and interest, at the time of the decree, to two hundred and five dollars. McCann had paid only eighty-five dollars and fifty cents on the note, and could foreclose for no more than that amount. The foreclosure for that sum was in direct accord with the agreement.

V. It is claimed that McCann did not unqualifiedly agree to prosecute the case to a foreclosure, and that if he had done so in consideration of release from the note and eighty-five dollars and fifty cents and interest, the agreement would have been champertous, and could be enforced by neither party. The foreclosure of the mortgage was for McCann's benefit, and could not furnish a consideration for release from the note and payment of eighty-five dollars and fifty cents. The consideration for that agreement is the undertaking of McCann that upon sale of the mortgaged premises they shall be deeded to Cooley. There is no element of champerty in the agreement as we can see. The referee has found that McCann did agree to foreclose the mortgage

2. STATUTE of
frauds: agree-
ment to con-
vey.

3. CONTRACT:
champerty.

Wagner v. Varner.

and cause the conveyance, upon sale, to be made to the plaintiff. The finding is not without support in the evidence.

VI. The referee found that McCann agreed that if he should buy in the property at sheriff's sale he would make a deed to plaintiff; that he did buy in the property and received a certificate of purchase, and that he tenders the same in court for the use of the plaintiff. The evidence shows that McCann bought the property at sheriff's sale during the pendency of this trial, on the 25th day of May, 1878, subject to redemption within one year. Defendants amended the answer and pleaded a tender of this certificate to plaintiff. The referee finds that McCann agreed to deed the property to plaintiff. He has not done so, and, if the property shall be redeemed from the sale, he may not be able to do so. The defendant has not shown a compliance with the agreement which the referee finds he made. The defendants are entitled only to have the action of plaintiff abated until it shall be determined whether the property will be redeemed from the sheriff's sale. In rendering an absolute judgment against plaintiff the court erred. The judgment is reversed, and remanded for judgment in harmony with this opinion.

REVERSED.

WAGNER V. VARNER.

1. **Heir: ADOPTED CHILD.** Where a father adopted two children of his daughter, and afterward died, leaving no will, it was *held* that the children so adopted would inherit from him as his own children, and would also inherit the share of their deceased mother.

Appeal from Van Buren Circuit Court.

TUESDAY, APRIL 22.

MAHALA BOYER, daughter of John Bumer, died in 1864, leaving two children, who are the wards of the plaintiff, sur-

Wagner v. Varner.

viving her. In the same year—but whether before or after the death of said Mahala does not appear—John Bumer adopted said children, as provided by law, and in 1876 died without having made a will. Said Bumer left several other children surviving him. The plaintiff claims that his wards are entitled to inherit a share of the estate of said Bumer, as his children by adoption, and also the share their mother would have been entitled to had she outlived him. The Circuit Court held that said children could only inherit by reason of their adoption, and rejected the other claim. The plaintiff appeals.

G. W. Ringer and Work & Brown, for appellant.

Lea & Beaman, for appellee.

SEEVERS, J.—It is provided by statute that the “consent of both parents, if living, and not divorced or separated, and if divorced or separated, or if unmarried, the consent of the parent lawfully having the care and providing for the wants of the child; or if either parent is dead then the consent of the survivor; or if both parents be dead, or the child shall have been and remains abandoned by them,” the consent of certain named officers, is necessary before the child can be legally adopted. Code, § 2308.

When thus adopted “the rights, duties and relations between the parent and child by adoption shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth.” Code, § 2310.

In the absence of a will the estate descends in equal shares to the children of the deceased. Code, § 2453. If one of the children of the deceased “be dead, the heirs of such child shall inherit his share * * * in the same manner as though such child had outlived his parents.” Code, § 2454.

Under section 2310 the wards of the plaintiff inherit as the children by adoption of John Bumer, and if Mahala Boyer

Wagner v. Varner.

had outlived him she would have inherited as the natural child of said Bumer, under section 2453; and section 2454 expressly provides that her children shall inherit in the same manner as though she had outlived her father.

There is no escape from this conclusion unless it can be said that the child by the adoption is disinherited by its natural parent.

Because of the adoption the child acquires certain additional rights, but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as may subsequently accrue, except as is by statute provided.

The argument that these children cannot inherit through their mother leads to this result. Suppose their father after her death consented to their adoption, they could not inherit through their mother or from their father, or through him from a remote ancestor.

By the act of adoption these children became in a legal sense the children of John Bumer. Nevertheless they are the children of their natural parents, and the act of adoption does not deprive them of the statutory right of inheriting from their natural parents, unless there is a statute which in terms so provides. Not only is there no such statute, but we think the contrary is expressly provided.

If, therefore, a child is adopted by a stranger it will inherit from its natural parents, in the absence of a will, because section 2453 of the Code in express terms so provides.

So far we have gone on the supposition that the parents have consented to the adoption. But, as we have seen, such consent in certain contingencies may be given by other persons. Can it be that in such case the child is disinherited by the natural parent without the consent of the latter, in view of the foregoing statutory provisions?

It is said that a child has no natural right to the estate of a deceased parent. Such thought, however, has but little significance in this connection, for the reason that the statutory right is perfect and ample. Nor is the argument that

Rutt v. Howell.

these two children inherit from two sources, and thus get more than their proper share, entitled to much weight. The reply would seem to be pertinent here that heirship is not a natural but a statutory right, arbitrary and general, and, therefore, exceptional cases of apparent hardship or inequality must occasionally occur.

When these children were adopted by John Bumer the effect was to increase, in a legal sense, the number of his children and heirs, and if he died without a will the shares of his natural children were thereby decreased. This was the only effect of the act so far as the right of inheritance was concerned. The rights of his natural children, including Mahala Boyer, in all other respects remained just as they were before. The result is that the judgment of the Circuit Court must be

REVERSED.

50	535
91	273

RUTT V. HOWELL ET UX.

1. **Homestead: VERBAL AGREEMENT.** The homestead cannot be subjected to liability for debt upon a mere verbal agreement.
2. ———: ———: **CONFESSION OF JUDGMENT.** An agreement in a confession of judgment to waive the protection of exemption laws, and to permit execution to issue against any property of the judgment debtor, homestead included, is not such a written contract as will subject the homestead to liability.

Appeal from Hamilton District Court.

TUESDAY, APRIL 22.

An opinion was heretofore filed in this case, and the cause is now before us upon rehearing. The petition in substance alleges that the assignor of plaintiff, one Snow, advanced to the defendant the sum of seven hundred and thirty-eight dollars and sixty-six cents, to pay a debt to one Browning, with the express understanding and verbal agreement with the

Rutt v. Howell.

defendants, who are husband and wife, that the defendant William Howell should execute his promissory note for the amount, which should be secured by a lien on lots 5 and 6, in block 7, in the village of Webster City, occupied by defendants as a homestead, and the defendants promised and agreed that the papers should be executed at once, pledging the said property for the payment of said debt; that on the 25th day of July, 1869, the defendant William Howell executed a promissory note to said Snow, in pursuance of said agreement, for the amount of said loan; that in further pursuance of said agreement the defendants, on the 29th day of July, 1869, gave a confession of judgment and stipulation in writing, signed by them, agreeing and expressly stipulating that the homestead should be liable for said judgment; that the notary or person who drew the confession of judgment neglected to state fully that said defendants stipulated that the homestead should be liable for said judgment, and failed and neglected to describe the homestead property; and the person who drew the entry of judgment, which was prepared for the clerk to enter judgment upon said confession, neglected and failed to make said judgment a lien on the homestead in terms, or to provide that a special execution issue against the same; and that these omissions were through the accident, mistake and oversight of these persons.

The petition prays that the confession of judgment and the judgment entry may be corrected so as to conform to the true intent of the parties, and made a specific lien on said homestead property, and that the same be sold to satisfy said judgment. The defendants demurred to the petition. The demurrer was sustained, and judgment was rendered against the plaintiff for costs. The plaintiff appeals.

Chase & Covil, for appellant.

Miracle & Kamrar, for appellees.

DAY, J.—I. The rule is that the homestead is exempt

Rutt v. Howell

from judicial sale. Code, § 1988. It can be rendered liable for the debts of the owners only in the manner provided by statute. Section 1993 of the Code provides: "The homestead may be sold for debts created by written contract, executed by the persons having the power to convey, expressly stipulating that the homestead is liable therefor." The homestead cannot be rendered liable by mere verbal agreement. The statute does not provide that liability can be created in that way. It is apparent, therefore, that no consideration can be given to the portion of the petition which alleges that it was verbally agreed, at the time the money was advanced, that the defendants should execute the necessary papers pledging the homestead for the debt. This agreement does not create any liability as to the homestead.

II. Appellant claims that the confession of judgment is such written contract as is referred to in the statute. The
 2. —: —: only reference to the homestead in this confession
 confession of judgment. is the following: "And if payment is not made hereon on or before the 20th day of January, A. D. 1870, aforesaid, execution may issue on this judgment immediately thereafter against any property belonging to said defendants, homestead included."

Section 1993 of the Code requires an express stipulation that the homestead shall be liable for the debt. The confession of judgment contains no such stipulation. It contains simply a waiver of the exemption statutes, and a consent that execution may issue against any property of the defendants. It has been held that a similar provision in a promissory note is against public policy and will not be enforced. *Curtis v. O'Brien & Sears*, 20 Iowa, 376, and cases cited. There is greater reason for holding such a provision invalid in a confession of judgment, for after the debt has been created the original agreement furnishes no consideration for a waiver of the exemptions allowed by law.

The judgment is

AFFIRMED.

Beecher v. The Board of Supervisors of Webster County.

50	538
140	170

BEECHER V. THE BOARD OF SUPERVISORS OF WEBSTER
COUNTY ET AL.

1. **Constitutional Law : TAXATION : REMISSION OF PENALTIES.** Chapter 29, Laws of 1874, requiring the board of supervisors to remit the penalties upon unpaid taxes when not collected in four years, is not in conflict with the Constitution as impairing the obligation of the contract between the treasurer and the county.
2. ——— : ——— : ———. Nor is it liable to the constitutional objection that it is a special law for the assessment and collection of taxes.
3. ——— : ——— : ———. The statute is not against public policy as encouraging delinquencies in the payment of taxes.

Appeal from Webster Circuit Court.

TUESDAY, APRIL 22.

· MANDAMUS to compel defendant to remit the interest and penalties upon taxes on personal property assessed against plaintiff, as required by chapter 29, Acts Fifteenth General Assembly. A demurrer to the petition was overruled, and defendants refusing to further plead, judgment was rendered for plaintiff. Defendants appeal.

John F. Duncombe, for appellants.

John Garraghty, for appellee.

BECK, CH. J.—I. The petition alleges that certain taxes upon personal property were assessed and levied against plaintiff, which for more than four years the treasurer of the county failed to collect by distress and sale of property, or to bring forward upon the tax books as required by Code, § 845, and that plaintiff made application to the board of supervisors to remit the penalties and interest which had accrued upon such taxes, as that body is required to do by chapter 29, Acts Fifteenth General Assembly. Upon the refusal of the supervisors to enter the remission as requested, plaintiff instituted,

Beecher v. The Board of Supervisors of Webster County.

this action to compel the performance of the duty prescribed by the statute. The petition was assailed by a demurrer on the grounds that the statute is in conflict with the constitution and against public policy.

The points made by counsel for appellants will be considered in the order of their presentation in his argument.

II. It is first insisted that the statute is in conflict with the Constitution, in that it impairs the obligation of the contract existing between the treasurer of the county and the people, which binds the officer to perform his duties faithfully. The statute, it is claimed, impairs the obligation of this contract in this way. The treasurer is required by his duty to collect the taxes. He negligently fails so to do for four years. The statute thereupon remits penalties and interest, and thereby releases the treasurer from liability for neglect of duty in the collection of the taxes. While we do not attempt to use the language of counsel, we think the foregoing a fair and full presentation of the point.

We may, for the purposes of this case, admit the existence of the contract between the treasurer and the people, or between that officer and the State, but we do not think that the statute releases the treasurer from liability on account of his negligence, if negligence in fact exists. The law, in effect, provides that the interest and penalties are collectible within four years and not afterward. It operates as a statute of limitations. No rule of law would relieve an officer or agent, charged with the collection of money, of liability for negligence in failing to make the collection before the claim or debt is barred by the statute of limitations. There is reason to hold that the case of the treasurer is not different. He is charged with the collection of the penalties and interest upon taxes. They are not collectible after the expiration of four years. The officer negligently fails to make the collection within that time and thereby the county loses the money. Now, while we do not hold that the treasurer is liable in such a case, we

Beecher v. The Board of Supervisors of Webster County.

do say that he is not released from liability by the act in question. The statute requires the penalties and interest to be remitted on account of the neglect of the treasurer to collect the taxes or carry them forward. Surely it cannot be claimed that the treasurer is thereby released of liability for such neglect.

III. It is argued that the statute is in conflict with the Constitution, article 3, § 30, which prohibits special laws for
2 ____: ____: the assessment and collection of taxes. The effect
____ of the law need not be again stated. It surely cannot be claimed that a statute limiting the time for the collection of taxes would be a special law, because it would apply only to cases where the taxes were not collected within the time prescribed. Nor can it be said that the statute requiring interest to be collected upon taxes after the expiration of a certain time is a special law, because it applies only to the cases of taxes not paid before that time. The statute under consideration, which releases interest upon taxes, is no more special in its nature than the statute providing for interest. We think this point demands no further discussion.

IV. It is lastly insisted that the statute is in contravention of public policy, for the reason that it encourages delinquen-
3 ____: ____: cies in the payment of taxes. We do not discover
____ such an effect in the operation of the statute. If the officers do their duty the taxes will be collected; if they do not, there will be delinquencies. The delinquencies result not from the operation of the statute, but from failure in the discharge of official duty.

With the object and policy of the statute we have nothing to do. We fail to discover that it conflicts with the Constitution. We are required, therefore, to sustain it. The judgment of the Circuit Court is

AFFIRMED.

The State v. Doe.

THE STATE V. DOE.

1. **Criminal Law : AMENDMENT OF INFORMATION.** An information may be amended upon application to any extent which the court may deem consistent and proper.

Appeal from Allamakee District Court.

TUESDAY, APRIL 22.

On the 30th day of October, 1877, there was filed in the office of J. W. Pennington, a justice of the peace, an information in these words :

“STATE OF IOWA, }
ALLAMAKEE COUNTY, } ss.
“STATE OF IOWA, }
vs. } In Justice’s Court, before J. W. Pen-
JOHN DOE. } nington, J. P.

“The defendant is accused of the crime of peddling dry goods, shoe-laces, notions of various kinds, in the county aforesaid, without license. The said complainant, therefore, prays that the said defendant may be arrested and dealt with as provided by the statute of the State of Iowa.

[Signed], “PETER STEVENS, Constable.”

“Subscribed and sworn to by the said Peter Stevens, complainant herein, before me, this 30th day of October, 1877.

[Signed], “J. W. PENNINGTON, J. P.”

A warrant was duly issued upon this information, and the defendant was arrested and brought before said justice of the peace. The defendant made a motion for a change of venue, which was sustained, and the cause was sent to the next nearest justice of the peace in said county, where a regular trial took place upon said information, and the defendant was found guilty and was fined in the sum of five dollars and the costs. From this judgment the defendant appealed to the District Court.

50	541
79	118
50	541
108	736
50	541
117	468
50	541
126	500
50	541
131	490

The State v. Doe.

The cause having been reached for disposition in the District Court the defendant filed a demurrer to the information. The court sustained the demurrer. Thereupon the district attorney filed a motion for leave to file an amended information in said cause. With the motion was exhibited the proposed amendment, duly verified. The motion for leave to amend was overruled, to which ruling proper exceptions were taken.

Thereupon the court dismissed said cause, and discharged the defendant. The State appeals.

O. J. Clark, District Attorney, and J. F. McJunkin, Attorney General, for the State.

No appearance for appellee.

ROTHROCK, J.—In the case of *State v. Merchant*, 38 Iowa, 375, it was determined that “an information stands upon different grounds from an indictment, and is amendable.” In Bishop on Criminal Procedure, vol. 1, § 714, it is said: “The public officer by whom the information is presented and prosecuted being always in court, it may be amended, on application, to any extent which the judge deems to be consistent with the orderly conduct of judicial business, with the public interest, and with public rights.”

It is true that in *State v. Merchant, supra*, the information was in proper form, except that the name of the person making it was not signed thereto, and the only amendment sought to be made was affixing the proper signature, while in the case at bar it is conceded that the information in the charging part thereof is materially defective.

But, if the right of amendment be conceded, it may well be asked why limit it to such unimportant changes as permitting a signature to be affixed? We can see no reason why it should not be permitted to any extent “consistent with the orderly

1. CRIMINAL
law: amend-
ment of infor-
mation.

 Shelley v. Smith.

conduct of judicial business, with the public interest, and with private rights."

How any of these considerations precluded the amendment sought in the case at bar is not apparent. If the amendment would have been a surprise to defendant, the court, upon a proper showing, could have fully protected him by allowing sufficient time to prepare for trial upon the information as amended.

REVERSED.

SHELLEY V. SMITH ET AL.

1. **Practice : CORRECTION OF JUDGMENT ENTRY.** Where, in an action to foreclose a mortgage, a decree of foreclosure was prayed against the mortgagor and his wife, and a personal judgment against the mortgagor; and the clerk, in making the record entry, wrote "defendants" where he should have written "defendant," and improperly inserted the name of the wife in the judgment docket, *held*, that she was entitled, nine years afterward, to have the cause redocketed and the record corrected on motion.

50	543
102	403
50	543
104	382
50	543
107	39
50	543
114	128
50	543
1142	37
50	543
143	74

Appeal from Van Buren Circuit Court.

TUESDAY, APRIL 22.

MOTION to correct a record. The action was brought to foreclose a mortgage given to secure a promissory note executed by the defendant Fulton J. Smith. In the execution of the mortgaged Fulton J. Smith was joined by his wife, Marion Smith. She was made defendant in the action, but no personal judgment was claimed against her. Judgment and decree were taken by default. A decree was properly drawn and signed, providing for the foreclosure of the mortgage as against both defendants, and for a judgment against Fulton J. Smith for the amount of the note; and the decree, after providing for an execution sale of the mortgaged property, provided in the usual way that if the mortgage was not fully satisfied by the sale the plaintiff should have execution against the defend-

Shelley v. Smith.

ant Fulton J. Smith for any balance unpaid. The clerk, in making a record entry, wrote *defendants* where he should have written *defendant*, and he inserted the name of Marion Smith in the judgment docket. The mortgaged property having been exhausted without satisfying the judgment a general execution was issued, and was issued against Marion Smith as well as against her husband. She then caused the case to be docketed, and moved for a correction of the record. The court sustained the motion. The plaintiff appeals.

Lea & Beaman, for appellant.

Work & Brown, for appellee.

ADAMS, J.—The fact of the mistake is abundantly apparent, but it is insisted by the appellant that it is too late to correct it. The judgment was rendered in 1869, and the motion was made about nine years afterward. The appellant relies upon section 3156 of the Code, which provides that “the proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment, shall be by motion and within one year.”

1. PRACTICE:
correction of
judgment
entry.

In our opinion the section is not applicable. We think that no judgment was rendered against Marion Smith. No judgment against her was prayed in the petition, and the petition clearly shows that she was not made a party for that purpose, but merely for the purpose of foreclosing her interest in the land. No personal claim being made against her, it was her right to make default, and rest in the assurance that no personal claim could be established against her. The court never had jurisdiction of the subject-matter of a personal claim against her.

Furthermore, we think that the record entry sought to be corrected does not, upon a proper construction, show a judgment against her. It shows that the court finds that the defendant Fulton J. Smith is indebted to the plaintiff as claimed in the petition, and that there is now due from him

The State v. Hirronemus.

to said plaintiff, upon the notes sued on, the sum of one thousand one hundred and sixteen dollars and fifty cents. So far the record is correct, and this part must be allowed its influence in the construction of the record as a whole. The part in which there is a mistake is in these words: "It is, therefore, considered by the court that said plaintiff have and recover of said *defendants, Fulton J. Smith*, the sum of one thousand one hundred and sixteen dollars and fifty cents." The specification of one defendant by name, and only one, is of as much importance as the use of the plural of defendant before that one name; and clearly, taking the decree altogether, it appears to us that a personal judgment was rendered against Fulton J. Smith alone. But as it is liable to mislead, to the injury of Marion Smith, it is her right to have it corrected.

AFFIRMED.

THE STATE v. HIRRONEMUS.

1. **Bail: RECORD.** In an action on a bail-bond, the introduction of the record of forfeiture is admissible, even though it fail to show that the defendant was called in open court.
2. ———: **SURRENDER OF DEFENDANT: DISCRETION OF COURT.** It requires clear proof of abuse of discretion of the court, in refusing to remit a forfeiture, to justify interference with the court's action.
3. ———: **MEASURE OF DAMAGES.** The measure of damages is the penalty of the bond, and not the fine imposed and costs.

Appeal from Wapello District Court.

WEDNESDAY, APRIL 23.

THIS is an action upon a bond executed by the defendant for the appearance of Martin Dooley to answer to an indictment found against him for nuisance. The cause was tried by the court, and judgment was rendered against the defendant for two hundred dollars, the amount of the bond. The defendant appeals. The facts are stated in the opinion.

The State v. Hirronemus.

John B. Ennis, for appellant.

J. F. McJunkin, Attorney General, for the State.

DAY, J.—Martin Dooley was duly indicted by the grand jury of Wapello county for nuisance. On the 30th day of December, 1876, Dooley and the defendant, John Hirronemus, executed to the State of Iowa a bail bond in the sum of two hundred dollars, conditioned as follows: "Now, if said Martin Dooley shall personally appear at the next term of the Wapello District Court, on the first day thereof, to answer to said indictment, and shall not depart the court without leave, and obey all orders of said court, made in said case, this obligation to be void, otherwise in full force and effect." The accused appeared and pleaded guilty to the indictment. On said plea the court rendered against him a judgment of fifty dollars fine and fifteen dollars and seventy-five cents costs, together with an order of imprisonment as follows: "It is further ordered by the court that the defendant Dooley be confined in the jail of Wapello county at hard labor, either in or outside of such jail, until said fine is paid, at one dollar and fifty cents per day, unless said defendant is sooner discharged, by virtue of section 4611, Code 1873, and that a bench warrant issue to enable the sheriff to take the defendant into his custody, to carry into effect this judgment or order."

On the 11th day of February, 1876, a forfeiture of the bond was entered as follows: "Comes now the plaintiff by T. M. Fee, district attorney, and the defendant, being three times called to surrender himself in satisfaction of the judgment heretofore rendered in this case, came not, but made default, whereupon it is ordered by the court that his said default be entered against said Dooley. It is, therefore, ordered by the court that the bond for the appearance of the defendant, with the surety thereto, be and the same is hereby forfeited."

Dooley testifies as follows: "Defendant took steps to surrender me up. He got the sheriff to come where I was in bed,

The State v. Hirronemus.

here in town, and wake me up. Took me and put me in jail. This was two years ago. I think I was in jail about twelve days, when the defendant had me turned over to the sheriff. After this I was in jail, a year and a half ago; was then in jail twenty-one more days. I do not know in what all the cases I was in jail on. I was in jail this time two years ago. John Hirronemus had me turned over to the sheriff. I have been indicted within the eight years several times. I missed two courts. I guess it must be after notice that something was claimed. This was not before I was sued on the bond. I would not be positive whether it was after or before defendant was sued. I don't know now just what case it was in, but I know Hirronemus had me surrendered up to the sheriff."

The defendant also proved by the records of the court that Dooley paid on said judgment of fine against him thirty dollars cash, and that a warrant was issued and placed in the sheriff's hands for the arrest of Dooley in execution of the judgment of fine and imprisonment against him for a failure to surrender himself, in execution of which the defendant is sued. The defendant also offered to surrender Martin Dooley to the court in execution of the judgment, if anything be due thereon, but the court declined to take him, and refused to order the officers to take him, to which action of the court defendant excepted.

I. The defendant objected to the introduction of the record of the forfeiture of the bond because it does not show that

1. BAIL: record. Dooley was called in open court to surrender himself in execution of the judgment against him.

The admission of this record is assigned as error. The entry purports to be a record of the proceedings of the court. If the act occurred when the court was not in session it was the act of individuals only, and not of the court. Being, as the record states, the act of the court, it must have occurred in open court. It is not necessary that the record should state that the proceeding was had in open court, when it appears

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from what the record does show that it could not have been had in any other way.

II. It is urged that the court abused its discretion in refusing to remit the penalty in the undertaking. It is claimed that not only was over half the fine paid by Dooley, but he was also imprisoned on the very judgment in respect to which defendant is now sued on the bond. The evidence does not show that Dooley was imprisoned under the judgment in respect to which defendant is sued. Dooley testifies that during the eight years preceding the trial he was indicted at all the terms of court except two. He does not undertake to say that he was in jail under the judgment involved in this action. The presumption is that he was not in jail under this judgment, for as the judgment directed that the fine should be paid by labor at the rate of one dollar and fifty cents per day, if defendant had been in custody under this judgment he would not probably have been released until the fine was fully paid.

The evidence does show that Dooley's surrender and imprisonment were after this suit was instituted. The surrender not having been made until after suit was instituted it was a matter of discretion with the court whether the whole or any part of the sum so specified in the undertaking should be remitted. Code, § 4600. It requires a very strong instance of abuse to justify us in interfering with such discretion. *The State v. Scott*, 20 Iowa, 63. No such abuse of discretion appears in this case.

III. It is urged that the measure of damages is not the penalty of the bond, but the amount of the fine imposed and costs. It is very apparent, from section 4600 of the Code, that this is not so. Under this section the court may, in its discretion, remit the whole or a part of the sum specified in the bond, and, of necessity, in its discretion may refuse to remit any part of the sum specified, and render judgment for the penalty named.

The judgment is

AFFIRMED.

The Howe Machine Co. v. Woolly.

THE HOWE MACHINE CO. v. WOOLLY ET UX.

1. **Practice: EQUITABLE JURISDICTION: TRIAL BY JURY.** The overruling of a motion in an equitable action to divide the issues and try a question of fact to a jury does not constitute error, even though the court erroneously base its action upon a want of authority to grant the motion.
2. **Evidence: ADMISSIBILITY: PLEADING.** Under an allegation that defendant received and acted under written instructions, he could not introduce evidence of conversations with plaintiff's agents with respect to the manner in which he was to perform his duties.
3. **Surety: DEPARTURE FROM CONTRACT.** The fact that an agent, under a contract to sell machines, was paid some of his commissions before they were due, was not such a departure from the contract as would release a surety upon his bond for faithful performance of his obligation under the contract.

Appeal from Black Hawk District Court.

WEDNESDAY, APRIL 23.

ON the 30th day of July, 1873, the defendant John N. Woolly entered into a written contract with plaintiff, agreeing as agent to devote his time to the sale of sewing machines for the plaintiff. By said agreement he stipulated—*First*, to devote his entire time to the sale of said machines; *second*, to follow the consignor's general instructions and special direction in every particular relative to the sale of such machines; *third*, to render a detailed report of sale of each machine, and remit proceeds immediately; *fourth*, to make detailed statement of stock on hand when required; *fifth*, to keep machines unsold in good order, and return them on demand.

At the same time the said John N. Woolly and his wife, the defendant Eliza Woolly, to secure the performance of said written agreement, executed and delivered to the plaintiff a bond in these words:

"Know all men by these presents, that we, John N. Woolly

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and Eliza Woolly, are hereby held and firmly bound to 'The Howe Machine Company' in the sum of two thousand dollars, for which payment, with ten per cent attorney's fees thereon in case of suit on this bond, we bind ourselves," etc.

"Dated July 30, 1873.

"The condition of this obligation is such that if the above bounden John N. Woolly shall fulfill the foregoing agreement, by him executed, without fraud, misrepresentation or delay, and shall pay the said company all moneys, notes, leases and other property coming into his hands, by virtue of said agreement, and all costs, charges and expenses to which said company may be put in consequence of any failure on his part to perform said agreement, then this obligation to be void; otherwise, in force."

At the same time both of the defendants executed and delivered to the plaintiff a mortgage upon certain real estate, as security for the faithful performance of said contract and bond.

This action was commenced for the foreclosure of the mortgage, upon the alleged ground that said John N. Woolly had, in several instances, disregarded his duty as agent of plaintiff, and plaintiff's instructions, in that he sold machines to certain persons and took their notes and turned them over to plaintiff, and represented that the purchasers were solvent, which representations were false, and that said parties were worthless. It is averred "that such sales were contrary to the terms of said contract and bond, and the instructions of plaintiff to said defendant as their agent."

The petition also contains an itemized account of machine goods and merchandise, which it is averred were consigned by plaintiff to defendant J. N. Woolly, and not accounted for. Judgment was demanded for the several amounts claimed, and a decree of foreclosure was prayed.

The answer admits the consignment of the goods and merchandise to defendant John N. Woolly, and denies that he

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has refused to account for such articles at the price agreed therefor. The substance of the answer as to the sale of the machines to parties who were worthless is that said Woolly was directed by certain printed instructions of plaintiff to take property statements upon the back of notes received by him, and that by such instructions he was authorized to sell machines to such persons as would make statements showing that they were at the time of sale solvent and responsible. That in all cases the said defendant took such property statements in good faith, believing that the same were true. There was a trial to the court. Judgment was rendered for the plaintiff for three hundred and fifteen dollars, and a decree of foreclosure as prayed. Defendants appeal.

Boies & Couch, for appellants.

George Ordway, for appellee.

ROTHROCK, J.—I. Counsel for appellants urge that the petition does not state a cause of action against Eliza Woolly so as to justify a foreclosure of the mortgage in question as against her, because the averment that the sales of machines were contrary to the instructions of plaintiff, without a statement of what such instructions were, is wholly nugatory as the basis for the claim made by plaintiff.

In answer to this and other objections which are urged to the petition it is sufficient to say that they are made for the first time in this court. It does not appear that any motion was made for a more specific statement in the court below, and there was no motion in arrest of judgment.

II. The next point made is that no foreclosure of the mortgage should have been decreed against Eliza Woolly for the account for goods and merchandise not accounted for, because no part of this account was secured by the bond and mortgage.

It appears to us that the account is directly within the

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terms of the bond, which provide that John N. Woolly "shall pay to said company all moneys, notes, leases, and other property coming into his hands by virtue of said agreement."

III. At the trial defendants filed a motion to divide the issues, and try the question as to defendants' negligence in selling machines to irresponsible parties, to a jury.

1. PRACTICE:
equitable ju-
risdiction: trial
by jury.

The motion was overruled upon the ground that the court had no authority to make such order.

It is contended that the court erred in its conclusion as to its want of power in this respect. In *Sherwood v. Sherwood*, 44 Iowa, 192, which was an action for divorce, it is said: "It being an equitable action a right of trial by jury does not exist, and there was no error in refusing it. It would have been competent for the court to have had the issue respecting the alleged adultery tried by a jury, in order to advise the conscience of the court, and this in analogy to the English chancery practice. A refusal to do so, however, constitutes no ground for interfering with the judgment."

So in the case at bar it would have been competent for the court to divide the issues, and try the question as to the defendants' negligence by jury; but neither party had the right to demand it. The fact that the court believed there was no authority to thus divide and try the issues does not in any manner enlarge or change the rights of the parties.

IV. There was no motion or order at any time made for a trial of the cause upon written evidence. It is, therefore, not triable *de novo* in this court. Code, § 2742. We have repeatedly held that where the parties have not availed themselves of the provisions of that section there can only be a trial in this court upon errors assigned, as in a law action. *Walker v. Plummer*, 41 Iowa, 697; *Ashcraft v. De Armond*, 44 Iowa, 229; *Parmenter v. Elliott*, 45 Iowa, 317; *Richards v. Hintrager*, Id., 253, and other cases. The effect of the ruling in *Sherwood v. Sherwood*, *supra*, is that actions for divorce and the foreclosure of mortgages, and other actions of that class, must be tried as other chancery cases.

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V. The defendants have assigned errors. John N. Woolly, defendant, was a witness in his own behalf, and was asked this question by his counsel: "State whether, at any time during the time you were engaged in this business, you had any conversations or directions from their agents in regard to the manner in which they expected you to do business?"

2. EVIDENCE:
admissibility:
pleading.

The plaintiff objected to the question as incompetent. The objection was sustained, and defendants excepted.

The record then proceeds as follows:

"Defendants then offered to show by this witness what plaintiff's agents represented to him as his duty under his contract, and to prove the directions which they gave him in carrying out his contract, and to show that he followed those directions."

Plaintiff objected as incompetent under the pleadings, which objection was sustained. This ruling of the court was correct. It is alleged in the answer that the defendant was furnished by plaintiff with certain printed instructions. It is not averred that these were waived by the conversations or directions of agents of plaintiff. If defendant relied in his answer upon printed instructions, it was not competent for him to prove conversations had with agents, and directions received from them; and besides, if these directions were not verbal they would no doubt have been offered in evidence, that the court might determine their competency.

VI. A question is made as to the sufficiency of the evidence to sustain the judgment. In our opinion the court was fully justified in the finding made. There is much in the evidence tending to show that John N. Woolly sold the machines in question to persons who were notoriously irresponsible, and that he made up property statements which he had reason to know were not correct.

Lastly, it is objected that the evidence shows that plaintiff

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allowed John N. Woolly his commissions for the sale of machines before they were due by the terms of the contract and agency, and that this was such a departure from the contract as would discharge Eliza Woolly as surety on the bond. The bond secures the performance of the contract of agency. The contract provides that Woolly will, in all respects, faithfully and truly perform his duties as agent. He incurred liability by reason of unfaithful acts as agent of plaintiff, and for which both defendants are liable upon the bond.

AFFIRMED.

GORHAM V. MILLARD ET AL.

1. **Arbitration and Award: SETTING ASIDE AWARD: BURDEN OF PROOF.**
Where parties have submitted their controversy to arbitration, the one who seeks to set aside the award, on the ground of mistake, must not only clearly establish the mistake, and that he was prejudiced thereby, but also must show that if the mistake had not occurred the award would have been different.

Appeal from Pocahontas District Court.

WEDNESDAY, APRIL 23.

On the 24th day of May, 1877, an agreement to submit a controversy to arbitration was duly executed by Benjamin Millard, Fillmore Millard and H. A. Gorham, as follows:

"Whereas, a controversy pending between Fillmore Millard and Benjamin Millard and H. A. Gorham, of the town of Fonda, county of Pocahontas and State of Iowa, in relation to a partnership in the mercantile business now existing between them, with a view of dissolving and finally adjusting all matters connected with said partnership, now, therefore, we, the undersigned, Fillmore Millard and Benjamin Millard and H. A. Gorham, aforesaid, do hereby submit the

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said controversy, and all matters connected therewith, to the arbitrament of A. J. Whitfield, M. B. Keefer and George M. Dorton, all of the said town of Fonda, or any two of them, and we mutually covenant and agree to and with each other that the award to be made by the arbitrators, or any two of them, shall in all things herein be well and truly kept and observed; provided, however, that the said award be in writing, under the hands of the said A. J. Whitfield, M. B. Keefer and G. M. Dorton, or any two of them, and ready to be delivered to the said parties in difference, or to such of them as shall desire the same, on the 15th day of June next; and it is hereby further agreed by and between said parties that judgment in pursuance of the award may be entered in the District Court within and for the county of Pocahontas, State of Iowa, aforesaid, to the end that all matters now in controversy between them in that behalf shall be finally determined."

On the 4th day of June, 1877, the award of the arbitrators was filed in the office of the clerk of the District Court of Pocahontas county.

On the 11th day of September, 1877, Fillmore Millard filed a motion to set aside the award. The court sustained the motion, and ordered that the matter be re-submitted to the arbitrators.

On the 31st day of January, 1878, the arbitrators made the following report, duly signed by all of them:

"And now, on this 31st day January, 1878, this case coming on for further hearing, the following proceedings were had: Present, A. J. Whitfield, M. B. Keefer and George M. Dorton.

"H. A. Gorham appeared by counsel, Charles D. Goldsmith, and Fillmore Millard by counsel; — Lee.

"Now know ye that we, the arbitrators mentioned in the said submission, and the matters of arbitration having been re-submitted by order of his honor, E. R. Duffie, Judge of the District Court in and for the county of Pocahontas and State of Iowa, and having heard the allegations of the parties, and

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having examined into the affairs in controversy of said parties, and hearing the testimony, do make this award in writing, and find that Benjamin Millard has invested in the partnership the sum of sixteen hundred and seventy dollars and eighty-six cents (\$1,670.86); that Fillmore Millard has invested in the partnership the sum of eight hundred and twenty-two dollars and fourteen cents (\$822.14); and H. A. Gorham has invested in the partnership the sum of seven hundred and twenty-six dollars and fifty-nine cents (\$726.59); that under an agreement of the above-named parties to dissolve the partnership, and that the said Fillmore Millard and Benjamin Millard shall continue in the business, and take control of the entire amount of the assets of the firm, the said Fillmore Millard and Benjamin Millard now have in their hands the sum of five thousand three hundred and seventy-nine dollars and forty-two cents (\$5,379.42); that H. A. Gorham has in his hands the sum of ——— dollars; that under said agreement said Benjamin Millard and Fillmore Millard are jointly entitled to two thousand four hundred and ninety-three dollars (\$2,493), and that H. A. Gorham is entitled to the sum of seven hundred and twenty-six dollars and fifty-nine cents (\$726.59), and that the said Benjamin Millard and Fillmore Millard have in their hands property in the amount of seven hundred and twenty-six dollars and fifty-nine cents (\$726.59) belonging to H. A. Gorham.

“We find that H. A. Gorham is entitled to, and the said Fillmore Millard and Benjamin Millard shall pay or cause to be paid to, the said H. A. Gorham the sum of seven hundred and twenty-six dollars and fifty-nine cents (\$726.59), and interest thereon at the rate of ten per cent per annum from May 24, 1877; and that the said Benjamin Millard and Fillmore Millard shall retain the property in their hands under their agreement in full satisfaction of their claims; and that said H. A. Gorham shall have possession and right of control as a partner in said partnership until the said Benjamin Millard and Fillmore Millard shall have accepted this award

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in writing and filed said acceptance in writing with the recorder of deeds for record in the county of Pocahontas and State of Iowa. Costs taxed equal among the three parties."

On the 26th day of January, 1878, Benjamin Millard filed a motion to set aside the report of the arbitrators and for their discharge. The court overruled this motion, and rendered judgment on the award in favor of plaintiff and against the defendants for seven hundred and twenty-six dollars and interest. The defendants appeal.

N. B. Hyatt, for appellants.

J. A. O. Yeoman, for appellee.

DAY, J.—The motion to set aside the award of the arbitrators was supported by an affidavit of the attorney of defendants, as follows:

"I, T. Q. Lee, being duly sworn, on oath say that I was of counsel for Benjamin Millard and Fillmore Millard in the matter of arbitration between B. Millard, F. Millard and H. A. Gorham, tried before A. J. Whitfield, George M. Dorton and M. B. Keefer, arbitrators thereon, on the 31st day of January, 1878; that as counsel for B. Millard, for and in his behalf, I presented his claims against F. Millard and H. A. Gorham, as follows:

1. ARBITRATION and award: setting aside award: burden of proof.

"Claimed judgment for the sum of one thousand five hundred and forty-two dollars and twenty-eight cents as money loaned to said F. Millard and H. A. Gorham; also—

"Claimed as interest due on said loan, - \$72 97

"Claimed on rent of building, - - - 45 61

"Claimed on insurance as per contract, - 10 00

"I also presented a claim of B. Millard against H. A. Gorham for rent of dwelling, eleven dollars and ninety-one cents, and in support of all of said claims I offered in evidence the contract in writing made by the parties to said arbitration and under which they had been doing business, out of which the

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matters of difference herein arose, and also the testimony of B. Millard, H. A. Gorham and F. Millard. A copy of said contract is hereto attached, to which attention is particularly called. That the amounts of indebtedness upon each of said claims for loaned money, interest, rent, insurance, etc., as proved and admitted by the parties to said arbitration, were the amounts set opposite each of said claims above. All of said evidence as offered was admitted by said arbitrators. I also offered in evidence the contract hereto attached, marked 'A,' and also the testimony of H. A. Gorham and other witnesses, to prove that said B. Millard was not a partner in said firm, but simply a creditor thereof—the same being a matter of difference between the parties—and said evidence was admitted by said arbitrators.

"It was also a matter of difference between the parties to said arbitration what was the amount in value of the goods on hand of the firm of Millard & Gorham, reckoning said value from the cost price on said goods; and the testimony of F. Millard was taken upon said matter of difference, and the cost price of said goods, according to the testimony of said witness, as reckoned by me from the amounts named by him, was in the aggregate of three thousand five hundred and fifty-one dollars and fifty-nine cents, less an amount of thirty-one dollars and nineteen cents, which was admitted by all the parties to be overcharged, and no other witness was examined in relation to the costs of said goods. It was also a matter of difference between the parties what amount of money had been collected on the notes and accounts belonging to said firm, and the testimony of F. Millard was taken upon said matter of difference, and by his testimony, which was not rebutted or denied, it appeared that there had been so collected thereon as follows:

"Collection on accounts of firm of Millard &

Gorham,	-	-	-	-	\$690 47
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"Collection on notes of firm of Millard &

Gorham,	-	-	-	-	254 77
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"The value of the notes and accounts uncollected was also in difference, and the testimony of H. A. Gorham and F. Millard was taken upon said question, and the value of said accounts uncollected, according to the testimony of H. A. Gorham, was as follows :

"Value of uncollected accounts, - - \$426 30

"Value of uncollected notes, - - 93 49

"And the value of said notes and accounts belonging to said firm, according to the testimony of F. Millard, was nineteen dollars and sixty-six cents less than that as fixed by H. A. Gorham. It was also agreed by and between the parties, at the time of such trial, that H. A. Gorham had received of the firm the sum of three hundred and seventy-nine dollars and fifty-three cents (\$379.53,) and that F. Millard had received in like manner two hundred and ninety-three dollars and seventy-eight cents (\$293.78), and that none of said money had been returned.

"It was also shown by the testimony of F. Millard, and H. A. Gorham admitted, that the liabilities of the firm, other than that owed by them to B. Millard, amounted in the aggregate to two thousand one hundred and forty-nine dollars and sixty-three cents, for which amount B. Millard was, under the contract herein referred to, liable to pay.

"It was also a matter of difference between the parties what the cash or actual value of the goods belonging to the firm of Millard & Gorham was, and testimony was admitted upon said matter of controversy, but as the testimony was conflicting I am unable to state any amount thereon; that it was my understanding at the time of the final submission of the case that the figures above given by me were agreed to be correct, and that the arbitrators should so consider them."

The affidavits of Benjamin Millard and of Fillmore Millard, of similar import, were also submitted.

We think these affidavits do not require nor even authorize the setting aside of the award. The record does not set forth the evidence upon which the arbitrators acted. It may be

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that the defendants' attorney made before the arbitrators the claims set forth in the affidavits, and that the matters therein referred to were matters of difference between the parties, and that evidence was introduced establishing the items of account as set forth. And yet, for aught that appears, the arbitrators acted upon all these matters, and there was evidence introduced fully justifying their ultimate finding that H. A. Gorham is entitled to the sum of seven hundred and twenty-six dollars and fifty-nine cents as his full share of the partnership property. In *Tomlinson v. Tomlinson*, 3 Iowa, 575, a case in many respects similar to the one at bar, referring to the case of *Thompson v. Blanchard*, 2 Iowa, 44, it is said: "It was held in the above case that the whole burden of proof was on the party seeking to set it (the award) aside, and that it was his duty to clearly satisfy the court of any alleged mistake, and that he was prejudiced thereby. We perceive no reason for changing this rule, and least of all would be willing to recognize one less stringent. In these proceedings the parties select their own judges, and as a mode of settlement it should receive every reasonable encouragement from courts of justice. And, indeed, we may go further, and say that a party should not only make out the mistake clearly and fully, and that he was prejudiced thereby, but also show that if it had not occurred the award would have been different. *Knox v. Symonds*, 1 Ves., 369; *Burchell v. Marsh*, 17 How., 344. And the same is true where, in the absence of fraud, it is claimed that certain matters were in fact before the arbitrators, within the terms of the agreement, which were not acted upon or examined by them." See, also, *Tomlinson v. Hammond*, 8 Iowa, 40; *Ratliff v. Mann & Edwards*, 5 Iowa, 423.

It is urged by appellant that there is nothing whatever upon which to base the assumption that Benjamin Millard is a partner in the firm of Millard & Gorham. At the same time the affidavit states that it was a matter of difference between the parties whether Benjamin Millard was a partner in the firm or

 Williams v. The Niagara Fire Ins. Co.

simply a creditor thereof, and it is not shown nor claimed that the abstract presents all the evidence upon which the arbitrators acted. Besides, the agreement for submission to arbitration states that a controversy is pending between Fillmore Millard, Benjamin Millard and H. A. Gorham in relation to a partnership in the mercantile business existing between them, and that the submission is with a view of dissolving and finally adjusting all matters connected with said partnership. It is very clear that in this state of the record we cannot say that the arbitrators had nothing upon which to base an assumption that Benjamin Millard was a partner in the firm.

It is urged further that in the award it is assumed that under the agreement to submit to arbitration Fillmore Millard and Benjamin Millard should continue the business and take control of the entire assets, and that there is nothing in the agreement to arbitrate upon which to found such a conclusion. The award does not assume that the agreement of submission contains any such provision. It refers to *an* agreement of the parties as containing such provision, but does not necessarily refer to the agreement of submission. The record discloses nothing which requires that the award should be disturbed.

AFFIRMED.

WILLIAMS V. THE NIAGARA FIRE INS. CO.

1. **Pleading: REPLY.** The plaintiff may file a reply later than noon of the day succeeding that on which the answer is filed, upon reasonable terms to be imposed by the court.
2. **Practice: CONTINUANCE.** The granting of a continuance for the reason that the reply, which was not filed until the trial term, presented a new issue, rested within the discretion of the court, and an abuse of discretion would alone justify interference with his action.
3. **Insurance: CERTIFICATE: NEAREST MAGISTRATE.** A provision in a policy requiring that the certificate accompanying the proofs of loss should be given by the nearest magistrate, should receive a reasonable rather than a literal construction.

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4. ———: UNOCCUPIED BUILDING: ESTOPPEL. Notwithstanding the policy provided that if the premises became unoccupied during the life of the policy, without the written consent of the company indorsed thereon, the policy should be void, it was *held* that, where an agent insured an unoccupied building, and received the premium therefor, the company was estopped from denying that the policy had a legal existence.
5. ———: AGENCY. The policy not being delivered at the time it was written up, but subsequently handed to a messenger of the insured, the acts and declarations of such messenger would not be binding upon the insured without proof of his authority.
6. ———: PAROL CONDITION: BURDEN OF PROOF. The validity of the policy being determined, and defendant alleging that the premises were to have been occupied before the date on which the property was destroyed, it had the burden to establish that fact.
7. ———: EXPERT EVIDENCE. Expert evidence is not admissible to show the manner of adjustment of losses by insurance companies.

Appeal from Lee District Court.

WEDNESDAY, APRIL 23.

ACTION on a policy of insurance against loss or damage by fire. The policy was dated October 18, 1876, and insured the property for one year. The loss occurred on the 4th or 5th day of November, 1876. There was a trial by jury, judgment for plaintiff, and defendant appeals.

McCrory, Hagerman & McCrory, for appellant.

Gillmore & Anderson and *Craig & Collier*, for appellee.

SEEVERS, J.—I. The petition was filed in January, 1877, and the defendant required to plead thereto on April 3, 1877.

1. PLEADING: The answer was, in fact, filed on April 5th. The
reply. replication was not filed until December 13, 1877.

On the same day a motion was filed to strike the reply, because—*First*, it was not filed within the time required by law; *second*, because of the delay between the filing of the answer and reply; and, *third*, it was filed without leave of the court. This motion was overruled, and the ruling is assigned as error.

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Strictly, the reply should have been filed before noon of the day succeeding that on which the answer was filed. Code, § 2636. The statute, however, fails to provide any penalty for the failure to file the reply at that time, other than that the material allegations of the answer shall be deemed true. Code, § 2712. Until a reply was filed the defendant had the right to act on the supposition the answer was to be taken as true. Without doubt the defendant could have invoked the action of the court and had the issue settled at a much earlier day, if it had been deemed advisable to have the same done. But no such action was taken, and, if not a matter of right, it was clearly within the discretion of the court to permit the reply to be filed at the time it was. When the court overruled the motion it in effect granted leave to file. There was no necessity of going through the form of striking the reply because not filed in time, and then granting such leave; or, to say the least, it was within the discretion of the court to do so or not.

To prevent any possible misapprehension we incline to think the plaintiff had the absolute right to file the reply upon such reasonable terms as the court might see fit, and could properly, under the circumstances, impose.

II. Because of the reply being filed during the term, and the alleged fact that the defendant had prepared for the trial on the issue presented by petition and answer, and was not prepared to try the issue presented by the reply, a continuance was asked. It does not appear the application was sworn to. The granting of a continuance, for the reason above stated, is clearly within the discretion of the court. Before we can interfere it must appear such discretion has been abused, and that substantial justice will be more nearly obtained by our so doing. Code, § 2749. There is nothing showing any such abuse. There is no showing other than a simple statement to the effect that defendant was not fully prepared to try the issue presented by the reply.

2. PRACTICE:
continuance.

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Counsel do not insist there was any abuse of discretion, or that the defendant was prejudiced by the overruling of the motion, but urge that the plaintiff was permitted to file and read affidavits in resistance of the motion, and that this constitutes prejudicial error. Whether the right exists to file affidavits in resistance of a motion for a continuance, which is within the discretion of the court, we do not determine. What we do hold is that if the motion was insufficient and the discretion of the court not abused that the filing and consideration of affidavits in resistance thereto does not constitute prejudicial error.

Afterward there was filed an amended motion for a continuance, based on the absence of the president and secretary of the company, and it was shown by affidavit that they were not present, nor had their depositions been taken, because their evidence was unnecessary, as the issue stood previous to filing the reply. The fact expected to be proved by said witnesses was that the only authority of Collins, the agent with whom insurance had been effected, "was to receive proposals for insurance, to fix the rates of premium, to receive moneys for the same, and to countersign, issue, renew, and consent to the transfer of policies of insurance, in accordance with the rules and instructions of said company; that said authority is in writing, in the form of a commission to said Collins as agent."

Upon the presentation of the motion to the court the plaintiff's counsel stated that no objection would be made to the introduction as evidence of said commission and instructions. Whereupon the motion was overruled. In this ruling there was no error. It was not claimed that the commission and instructions were not at hand, and in fact they were introduced on the trial.

The other matters stated in the motion were immaterial under the issue and the law of the case as we understand it to be.

III. It is said the proofs of loss were insufficient in two

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particulars: *First*, that they were made before a notary public; and, *second*, they were not accompanied with the certificate, under seal of the nearest magistrate or notary public, as required by the terms of the policy.

3. INSURANCE:
certificate:
nearest mag-
istrate.

The proofs were in due time forwarded to the company, or its authorized agents, and the only objection made thereto was the "absence of the whole value of the property at the time of the fire." This objection is not now insisted on, but that the "proofs were not under seal" is the objection relied on. Having made a specific objection, which has been cured, all others must be deemed to have been waived. *Ayres v. Hartford Ins. Co.*, 17 Iowa. 176; *Young v. Same*, 45 Iowa, 377.

The provision in the policy that the certificate therein required must be given by the nearest magistrate or notary public was, without serious doubt, inserted for the purpose of preventing the insured from selecting the officer to perform such duty. While this is so, the provision must have a reasonable instead of a literal construction. It does not, we think, require that the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken. *Turley v. North American Ins. Co.*, 25 Wend., 374. Nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer nice distinctions as to the distance should not be indulged. A few feet more or less cannot be material.

Under this view the evidence fails to satisfy us the officer selected was not the nearest, as required by the terms of the policy, and the jury have found that he was.

IV. The plaintiff, when on the stand as a witness, gave her version of a conversation between herself, Collins, and Zollars, another agent of the company. When Collins was on the stand as a witness he was asked to state that conversation, and counsel stated that his object was to contradict or

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impeach the plaintiff. An objection to the proposed evidence was sustained, and defendant excepted. Thereupon counsel for the defendant stated they proposed to prove by the witness that he said to the plaintiff in said conversation that "Roberts had procured the policy to be delivered * * * under the statement that the house was then occupied, and that plaintiff replied: 'Mr. Roberts never stated that, and he will so swear;' shaking her fist in witness' face and saying, 'You lie, you lie, you lie.'"

The plaintiff, when testifying, denied using such language. Whether she did or not had no tendency to prove any issue in the case, and was, therefore, immaterial. Being so, the proposed impeaching evidence was also immaterial. Beside this, Collins testified that Roberts did tell him the house was occupied, and Zollars testified to what the plaintiff did say in said conversation. Clearly, therefore, there was no prejudicial error in the ruling.

V. The plaintiff, against the objection of the defendant, was permitted to prove the location of the house. It was only partially consumed, and the appellee claims the evidence was admissible under a clause in the policy which limited the extent of the liability in case the value of the property had depreciated from use or otherwise.

How this is we are unable to determine, as only a portion of the policy is before us, and no such provision is found in such portion. But we must, in the absence of any showing to the contrary, presume there was some provision of the policy which would justify the admission of the evidence.

It is difficult to conceive how this evidence could have had the important bearing claimed by the appellant, or how it could have had a prejudicial effect on the jury.

VI. There was a demurrer to the reply, which was overruled. Such ruling is assigned as error. Whether this

4. —: unoc- error was waived or not we do not determine—
cupied build-
ing: estoppel. it not being material to do so, as the same ques-
tion is presented on the instructions given the jury, among

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which are the following asked by the plaintiff, and given as modified by the court:

"If you believe from the evidence that on October 18, 1876, the date of the policy, the plaintiff stated to the agent of defendant that the house in question was unoccupied, and that the said agent of said company signed the policy and accepted the premium therefor, well knowing that said house was unoccupied, then defendant cannot avoid said policy by showing that said house was unoccupied at the date of said insurance.

[By THE COURT: Without further showing that it was in fact to be occupied before the time it was destroyed or injured by fire.]

"2. If the agent of defendant at Keokuk was authorized by defendant to countersign and issue policies, to accept risks offered him and receive premiums therefor, and he insured said house knowing the same was unoccupied, then the said insurance company will be bound by his acts."

The evidence on the part of the plaintiff tended to prove that it was understood and agreed between the plaintiff and Collins, at the time the policy was written up and the premium paid, that the house was unoccupied, and that it might remain so for the period of thirty days; and the defendant's evidence tended to prove that the house was to be occupied by the 1st day of November.

The policy provides: "Or if the premises are, at the time of issuing or during the life of the policy, vacant, unoccupied and not in use, whether by removal of the owner or occupant, or for any cause, without this company's consent is indorsed herein, this insurance shall be void and of no effect. * * *

The use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed restrictions therein, nor, in the event that this policy shall become void by reason of any of the conditions thereof, shall the agent

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have power to revive the same, except by issuing a new policy; and any policy so made void shall remain void and of no effect until removed by the actual issue and delivery to the assured of the new policy—any contract by parol or understanding with the agent to the contrary notwithstanding.”

The fire occurred on the 4th or 5th of November, which was within thirty days of the date of the policy, which, it is said, never existed as a legal and binding contract, because of the parol agreement made at the time it was written up as to the occupation of the building; the argument being, in brief, that a contract must be either wholly written or wholly in parol—that it cannot be a valid contract when partly written and partly in parol.

This case, therefore, it is said is distinguishable from *Viele v. Germania Ins. Co.*, 26 Iowa, 9, as in that case the contract at one time was valid and binding. The distinction we do not think well taken; but if so, such can hardly be said of the subsequent case of *Young v. Hartford Ins. Co.*, before cited. It must be regarded as settled law in this State that notice to an agent having the powers referred to in the second instruction is notice to the company. *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; *Alman, Miller & Co. v. Phoenix Ins. Co.*, 27 Iowa, 203; *Miller v. Mutual Ins. Co.*, 31 Iowa, 216.

We have, then, this case: The company, with full knowledge the house was unoccupied, and would be for a time, issues the policy and receives the premium, and then, after a loss occurs, insists it is not bound, and the policy never had a legal existence because said house was vacant.

Having issued the policy, taken the premium, and thereby induced the plaintiff to believe she was insured, the defendant is estopped from alleging or proving the policy never had a legal existence. By issuing the policy the defendant waived the conditions as to the occupation of the building, and also that such waiver should be expressed on the policy

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in writing. In addition to the cases heretofore cited see *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253.

What has been said applies with full force to the error assigned as to the sixth instruction.

VII. The policy was not delivered at the time it was written up, and the evidence tended to show that the plaintiff
5. —: —: directed one Roberts to go to Collins and get it
agency. for her, and that Roberts, at the time he got the policy, represented the house was occupied. The court instructed the jury that if "Roberts went to defendant's agent to get the policy, which had already been contracted for and paid for by plaintiff, and if he was only her messenger, authorized to get and bring to her said policy, then his acts and declarations as to any other matter cannot affect plaintiff's right to recover unless the defendant shows by the evidence that Roberts had authority or direction from plaintiff to act for her and represent her in the matters relied on by defendant to bind her."

The objection to this instruction is that it, in effect, takes from the jury the evidence given by defendant tending to show what Roberts said when he got the policy. We do not so understand it. All that it requires is that the authority of Roberts to bind the plaintiff by his acts and declarations should be in some manner made to appear to the satisfaction of the jury.

The authority of the supposed agent cannot be proved by his declarations. Something more than this is required.

VIII. It is conceded the fifth instruction, as to the weight to be given to verbal admissions, is in the exact language used in 1 Greenleaf on Evidence, § 200; but it is insisted that in this case, owing to peculiar circumstances, such an instruction is not applicable. We have carefully weighed all that has been said by counsel, and confess our inability to see wherein the instruction, as modified by the court, is not as fully applicable in this as any other case. We regard it as entirely unobjectionable.

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IX. The seventh instruction is objected to because it "erroneously puts on defendant the burden of proof as to how long the house was to remain unoccupied." We ^{6. ——— : parol condition: burden of proof.} do not concur in this proposition. The only contest in relation to the occupation of the house was whether it was to be occupied by the 1st day of November or within thirty days from the date of the policy. The validity of the policy being determined, the burden was on the defendant to prove that it was to have been occupied by the 1st day of November. If wrong in this, the fourth instruction given at the instance of the defendant, fairly and properly, when read in connection with the seventh instruction, placed the true question for determination before the jury.

When the question of the validity of the policy is separated from the question as to when the house was to be occupied, it will be readily seen that the burden was on the defendant to by proof shorten the life of the policy.

X. It is said there was no evidence on which the eighth instruction could properly be based; that the ninth is "verbose," and the tenth, eleventh and twelfth "single out evidence and give prominence to portions thereof, and importance to immaterial facts." It is deemed unnecessary to set out these instructions, or to give at length the reasons upon which our conclusions are based. We have carefully considered each objection, and examined the abstract and argument of counsel, and feel constrained to say that none of the objections are well taken.

The instructions asked by defendant and given in a modified form are, as they went to the jury, consistent with the other instructions which we have approved. It follows, therefore, there was no error in modifying them as was done. The twelfth instruction asked by the defendant was properly refused, because it was in direct conflict with the other instructions given.

XI. The court refused to permit the defendant to prove

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by "experts the manner of adjustment of losses" by insurance companies. This was clearly incompetent
 7. ———: expert evidence. evidence. The rights of the plaintiff were perfect or otherwise under the policy when the loss occurred. A custom as to the manner of adjusting such loss could not affect her unless she had knowledge thereof at the time the policy was executed, or at least that such custom was so general and well understood that it must have entered into and formed a part of the contract.

It is lastly urged the court erred in overruling the motion for a new trial; and, as we understand the point made, it is that the evidence is not sufficient to warrant the verdict. Under the settled practice of this court we cannot interfere with the verdict on this ground.

AFFIRMED.

SHIRAS V. OLINGER ET AL.

1. **Nuisance**: LIVERY STABLE. While a livery stable is not necessarily a nuisance, yet it may be so declared if it is built in close proximity to existing residences, and becomes seriously detrimental to the health and comfort of the occupants.
2. ———: ———: INJUNCTION. Where a livery stable had been burned down it was *held* that injunction would not lie to prevent its being rebuilt, since it might be so modified as not necessarily to become a nuisance.

Appeal from Dubuque Circuit Court.

WEDNESDAY, APRIL 23.

THE defendants, on the 17th day of September, 1878, owned and occupied a certain building in the city of Dubuque as a livery stable, being upon the north-west corner of Clay and Eleventh streets, fronting upon Clay and extending westward to an alley. The plaintiff is the owner of the lot next west, fronting upon Iowa street, and extending eastward to the

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131	661

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alley. Upon this lot is situated his residence, which he has owned and occupied from a time antecedent to the occupation of the defendants' premises for a livery stable. On the 17th day of September, 1878, a part of the livery stable was consumed by fire, by reason whereof the premises ceased to be used for a livery stable, and the use had not been resumed at the time of the commencement of this action, but the defendants were about to rebuild and resume such use.

The plaintiff avers that the occupation of the premises for a livery stable has been a nuisance, and asks that it be so decreed, and that the defendants be restrained by injunction from such use, and from rebuilding. The court rendered a decree enjoining the use, but not the rebuilding. The defendants appeal.

Fouke & Lyon, for appellants.

Shiras, VanDuzee & Henderson, for appellee.

ADAMS, J.—Two questions are presented in this case. The *first* is as to whether the premises as used have been a nuisance; and, *second*, whether, the use having ceased, an injunction will lie to prevent its being resumed.

I. A livery stable in a city is not necessarily a nuisance, but may be so under some circumstances. *Burditt v. Swenson*, 17 Texas, 489; *Dargan v. Waddell*, 11 Humphreys, 406; *Coker v. Berge*, 10 Ga., 366; *Aldrich v. Howard*, 8 R. I., 246. It may doubtless be declared a nuisance if it is built in close proximity to existing residences, and becomes seriously detrimental to the health and comfort of the occupants. In the case at bar the original stable abutted upon the alley, with two doors opening upon it, and within forty feet of the east wall of the plaintiff's house. The stable, if rebuilt as proposed, will occupy the same place, and open upon the alley in the same way. The original alley doors were used for the removal of offal. The alley doors in the rebuilt stable are to be used for the same

1. NUISANCE:
livery stable.

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purpose, necessitating the use of the alley as a temporary place of deposit.

The testimony of members of the plaintiff's family and of other persons living in the immediate vicinity was taken in regard to the odors emanating from the stable. It is not entirely uniform; but in regard to the plaintiff's house it is clearly established that offensive odors were almost constantly perceived within it, and that sometimes they were such as to render it necessary to keep the doors and windows closed upon the east and south sides. Expert evidence was introduced to the effect that while it is not clearly established that gases from a livery stable generate any specific disease, they are regarded by the medical profession as noxious if allowed to permeate residences, increasing exposure to disease, especially in case of epidemics, and constituting generally in disease an aggravating element. Evidence was also introduced showing that sickness in the plaintiff's family and other families near the stable had probably occurred or been aggravated by gases from the stable. On the other hand there was medical evidence tending to show that it has not been observed that persons employed in a livery stable are more subject to disease than others.

We conclude from the evidence that whatever deleteriousness there may be in gases from a livery stable, it is not of a very marked character; that persons of out-of-door habits may perhaps be exposed to them with impunity, especially in the absence of any epidemic; but that a residence very greatly permeated by them must be regarded as unwholesome, and to some persons, under some circumstances, likely to prove dangerous.

We are aware of the necessity of livery stables in cities, and of the difficulty of locating them so far from where persons reside that no one shall feel annoyed by their proximity. They are supposed to depreciate the value of residence property to a much greater distance than the gases can be harmful or possibly penetrate. In the disposition which exists to

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make war upon them there is great danger that injustice will be done to their proprietors if they can readily be declared a nuisance. We have accordingly hesitated in coming to the conclusion which we have reached that the use of the defendants' premises for a livery stable was a nuisance. In so doing it is proper that we should say that the objection to the stable, in our mind, arises largely from the construction of the doors upon the alley so near the plaintiff's residence, the removal of the offal through those doors, and the use of the alley, under the circumstances, as a temporary place of deposit.

II. It is urged, however, that the use of the premises for a livery stable having ceased, an injunction will not lie to ^{2.} : : prevent its being resumed. Our attention is _{injunction.} called to the case of the *Earl of Ripon v. Hobart*, 3 Mylne & Keene, 177. Lord Chancellor Brougham said that "no instance can be produced of the interposition by injunction in case of an eventual or contingent nuisance." It was held, too, in *Flint v. Russell*, a recent case in the Circuit Court of the United States for the eastern district of Missouri, that the keeping of a livery stable in a city, not being necessarily a nuisance, no injunction would lie against it in advance. The reason given is that it cannot be determined in advance that it would prove to be a nuisance. This case differs from that in the fact that the effect of the proposed use has been practically demonstrated. It is possible that the premises might be so used as not to be a nuisance. It would indeed be evident that they could, if the fault had been in the mode of keeping them. But the evidence shows that they were well kept. Upon this point a witness testified as follows:

"I have been in the stable almost every day since Olinger kept it; the condition of the stable was first-class; there were not any more smells or stenches ensuing from it than from any of them."

Other witnesses testified substantially to the same effect.

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This testimony is undisputed. It may be taken, then, as established that the nuisance has resulted from the location and structure of the building, and mode of using it, rather than from any negligence in keeping it. Unless some change can be introduced more radical than would pertain to mere care in keeping it, the use, if resumed as proposed, would, we think, be a nuisance. But, inasmuch as a livery stable is not a nuisance *per se*, and it is not impossible that a change may be introduced which would obviate all objections, we think that the decree enjoining the use absolutely went too far, and should be so modified as simply to enjoin such use as we have found would be a nuisance, to-wit: all use that would be substantially like the use heretofore made of the premises. If we should go further than that it appears to us that we should be determining in advance of any practical demonstration what would be a nuisance, and that in so doing we should contravene well-recognized legal principles. If a use essentially different should be adopted a new question would arise to be determined upon its own merits.

MODIFIED AND AFFIRMED.

THE STATE V. KRANER.

1. **Ball; REMISSION: DISCRETION OF COURT.** The remission of the whole or any part of a forfeited bond, after the defendant has been surrendered, rests within the discretion of the court, and his action will not be reversed unless an abuse of discretion be shown.

Appeal from Wapello District Court.

WEDNESDAY, APRIL 23.

On the 3d day of September, 1875, an indictment was found against one Michael Shanahan. On January 7th, 1876, the defendant, Kraner, executed a bond for the appearance of Shanahan at the next term of the District Court there-

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after. The defendant appeared and pleaded guilty to the crime charged in the indictment. Afterward the court adjudged that Shanahan should pay a fine and costs, and ordered that he be confined in the jail of the county until such fine should be paid, at one dollar and fifty cents a day, unless sooner discharged, and that a bench warrant issue to enable the sheriff to take the defendant into his custody to carry into effect the judgment and order; and a warrant was issued for the arrest of Shanahan.

Afterward, and on the 11th day of February, 1876, Shanahan not having been arrested, upon motion of the District Attorney he was called in open court to surrender himself in satisfaction of the judgment theretofore rendered, and having failed to appear the bond for his appearance was forfeited. Afterward, but at what time the record does not disclose, Shanahan voluntarily surrendered himself to the sheriff in satisfaction of said judgment, and he was kept in custody of the sheriff, imprisoned in the jail for the period fixed by the sentence.

This action was brought to recover the amount of the bond given for Shanahan's appearance. There was a trial by the court. A judgment was rendered for the State for the amount named in the bond. Defendant appeals.

John B. Ennis, for appellant.

John F. McJunkin, Attorney General, for the State.

ROTHROCK, J.—The cause is argued upon the theory that the defendant Kraner surrendered Shanahan to the sheriff on a certified copy of the undertaking. The position is not sustained by the record. It appears that Shanahan surrendered himself to the sheriff. This must have been after the bond was forfeited, otherwise no forfeiture would have been taken. The bond required that Shanahan "should appear * * * to answer the indictment, and not depart without leave of the court, and obey all orders of the court." He appeared and

 McCoy v. The First National Bank of Mount Pleasant.

pleaded guilty, but departed without leave of the court, and when he failed to answer, upon being called to surrender himself in satisfaction of the judgment, the bond was rightfully forfeited, and the surety's liability was then fixed.

The Code provides that if, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may in its discretion remit the whole or any part of the sum specified in the undertaking. Section 4600. It is urged that because Shanahan had been imprisoned in satisfaction of the judgment the court should have remitted the whole or some part of the undertaking. This question was determined in *State v. Kraner*, *post*, 582. No abuse of discretion is shown. It does not appear when Shanahan surrendered himself. For aught that does appear the county may have incurred large expense in endeavoring to arrest him before the surrender.

We cannot presume that the judgment of the court below was an abuse of a sound legal discretion.

AFFIRMED.

 MCCOY V. THE FIRST NATIONAL BANK OF MOUNT
PLEASANT ET AL.

1. **Damages : INTERFERENCE WITH SALE.** A party owning land incumbered by a mortgage which was of record, offered the same for sale at public auction, at which there were no bidders, for the alleged reason that those intending to bid were warned by the agent of the mortgagee that the party purchasing would buy a law-suit, and that the property should not be sold: *Held*, that an action for damages would not lie against the mortgagee.

Appeal from Washington District Court.

WEDNESDAY, APRIL 23.

On the 22d day of October, 1870, the defendants held certain mortgages upon the real estate and chattel property of

McCoy v. The First National Bank of Mount Pleasant.

the plaintiff, and on that day the following written agreement was entered into by the parties thereto:

"It is stipulated and agreed between the Farmers' & Merchants' Bank of Washington, Iowa, and the First National Bank of Mt. Pleasant, Iowa, as follows:

"STATEMENT.

"The said Farmers' & Merchants' Bank holds a mortgage of B. M. McCoy and wife for eight thousand three hundred and ninety-eight dollars. In form the note is recited as, and mortgage, as to J. R. and L. C. Richards, and is of date September 22, 1870, and said First National Bank holds a note of said B. M. McCoy and others for seven thousand dollars, with two mortgages (one real and one chattel), of even date herewith, made by said McCoy and wife to secure the same.

"Now, it is agreed that said three mortgages shall be regarded as simultaneous—no priority. Any amount made in meantime, by sale of any of said land or by any of said personal property, is to be paid to said creditors in proportion to their respective demands, and the parties hereto will consent to the sale of any part of said lands at fair cash rates; the proceeds to be applied to pay said debts in proportion as aforesaid. Either party may proceed to collect, and neither hereby suspends their rights other than as to mortgages as aforesaid.

"Should said mortgages have to be foreclosed, as either party may elect to do, then the purchase or proceeds is to be for the mutual benefit of the two banks, in proportion to their respective demands as aforesaid—each bank to give credit for the amount actually received by such bank arising from the sale of such mortgaged property, or any part or parts thereof.

"Neither party suspends any right of action, or surrenders or modifies any right personal against any of the makers of their respective notes.

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"This agreement relates to the mortgaged property and its disposition and proceeds only.

"Witness our hands this 22d day of October, 1870.

"A. W. CHILCOTE,

"President Farmers' & Merchants' Bank.

"P. SAUNDERS,

"President First National Bank, Mt. Pleasant.

"I consent to the foregoing.

"B. M. McCoy."

This action was commenced July 6, 1875. It is averred in the petition, in substance, that the plaintiff became a party to said written agreement, and was entitled to any benefits that might accrue to him by reason thereof; that after said agreement was executed the plaintiff, at the special instance and request of defendants, advertised said real estate to be sold at public auction, intending to sell the same if a fair price could be received therefor, and apply the proceeds of such sale in payment of said indebtedness, and that said banks agreed with plaintiff that said real estate might be thus sold, and agreed to receive the proceeds of such sale to apply on said indebtedness; that said real estate consisted of six hundred and fifty-five acres, and plaintiff proceeded to offer the same for sale at public auction, and parties desiring to purchase the same were present at said sale, intending to purchase said real estate, which at that time was worth the sum of twenty-two thousand nine hundred and twenty-five dollars, and would have sold for that sum to parties then present intending to purchase, and the same would have been purchased by such parties, at that time, if the sale had not been interfered with by defendants; that at said date said First National Bank of Mount Pleasant, by its agent, Henry Ambler, and said Farmers' & Merchants' Bank, by statements made to parties who proposed to purchase said land, and otherwise, wrongfully interfered with said sale, and prevented the sale thereof by plaintiff, by publicly announcing that the same should not

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be sold, and that parties purchasing would buy a law-suit, and by declaring that said real estate should not be so sold, and refusing to have or allow the same to be sold at said public sale; that afterward the defendants caused said land to be sold on the foreclosure of said mortgages for the sum of thirteen thousand five hundred and sixty-six dollars, whereby plaintiff was damaged in the sum of nine thousand dollars; that the plaintiff, at the instance and request of defendants, expended large sums of money in advertising said real estate to be sold, and in making preparations for such sale, which expenditure, by reason of said wrongful acts of the defendants, was of no benefit to plaintiff, as it would otherwise have been, and by reason of said wrongful acts of the defendants plaintiff's land was afterward sold under execution, thereby causing plaintiff to pay a large amount of costs and other expenses, to the damage of plaintiff in the sum of one thousand dollars; that it was understood and agreed between plaintiff and defendants that, under the terms of said written agreement, said real estate should be advertised and sold, and the proceeds of such sale applied in payment of plaintiff's indebtedness to defendants; and it was understood and agreed that such sale should be in place of foreclosure proceedings, and for the purpose of avoiding delay and expense; and in all things connected with such advertisement and sale defendants consented to the acts of plaintiff, and assisted him therein up to the time of the wrongful acts complained of.

To this petition the defendants filed a demurrer, setting out the following among other grounds therefor:

"1. That said petition shows no cause of action, and that no injury resulted or could have resulted to plaintiff which might not have been avoided by plaintiff complying with his contract, by paying his indebtedness to defendants, either out of the proceeds of the sale of lands or from any other source.

"2. That petition shows that if plaintiff had proceeded with his proposed sale the debt of defendants would have been

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thereby paid, whereby no interference could have occurred on part of defendants to the damage of plaintiff, without defendants' assent and approval."

The demurrer was sustained. The plaintiff elected to stand on his petition, and judgment was rendered against him for costs. Plaintiff appeals.

McJunkin, Henderson & Jones, for appellant.

H. & R. Ambler, for appellees.

ROTHROCK, J.—The wrongful acts complained of, and which are the basis of the plaintiff's cause of action, are that defendants prevented the sale of the real estate by publicly announcing that the same should not be sold, and that parties purchasing would buy a law-suit. It is not averred that the agents of the defendants slandered the title of the plaintiff by asserting or claiming that the defendants had any interest in the land other than as the owners of the mortgages thereon. It is averred that the sale was intended for the very purpose of paying off these mortgages. If so, persons intending to purchase must have been advised of the terms of the sale, and of the liens upon the land necessary to be discharged in order to make good title. Indeed, it is fair to assume that persons intending to purchase would have ascertained the condition of the title as it appeared of record. With this knowledge, which must have been acquired in one way or the other, the idle and gratuitous threats of the agents of the defendants would have no influence with a party who was ready to bid for the real estate some nine thousand dollars more than sufficient to pay all the indebtedness due to the defendants. There was no necessity for the defendants' assent to the sale. It was plaintiff's undoubted right to sell the land at any time or in any manner before foreclosure, so that he made provision for the payment of the amounts due on the mortgages, and how the defendants could, by declaring that a sale should not take place, influence purchasers not to

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bid an amount largely in excess of sufficient to pay the mortgages, is more than we are able to determine.

It will be observed that it is averred that parties were present who would have purchased the real estate for a sum much larger than the amount of the mortgages. If this estimate of what persons would have paid for property at a public auction is a fact susceptible of proof, and which may be the foundation of an action for damages, a point not necessary to be determined in this case, yet it cannot be said that they were prevented from purchasing by the alleged acts of the defendants. If they were thus prevented, it seems to us that fact would be rather too remote to become the foundation of a suit for damages.

AFFIRMED.

THE STATE V. KRANER.

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- 1 **Bail: EXONERATION.** To exonerate himself the bail must arrest and surrender the party indicted to the sheriff, upon presenting him with a copy of the bond.
2. ——— : ——— : **DISCRETION OF COURT.** The court may, at his discretion, remit the whole or any part of the amount of the bond before judgment is entered, if the defendant be surrendered; but the action of the court in such case will not be reversed unless an abuse of discretion is shown.
3. ——— : ——— : **OFFICER.** The failure of the sheriff to arrest the party indicted when the bail presents the bond, will not exonerate the bail from liability upon his undertaking.

Appeal from Wapello District Court.

WEDNESDAY, APRIL 23.

ACTION at law upon a bail bond for the appearance of one Hillier, who was arrested on a warrant issued upon an indictment. The cause was submitted to the court without a jury and judgment was rendered for plaintiff. Defendant appeals.

The State v. Kraner.

John B. Ennis, for appellant.

J. F. McJunkin, Attorney General, for the State.

BECK, CH. J.—I. The record discloses the facts to be as follows: Hillier was indicted for the crime of nuisance, and defendant became his bail in a bond conditioned that Hillier should personally appear at the next term of court, and should “not depart without leave of the court, and obey all orders of said court made in said case.” At the appearance term Hillier appeared and pleaded guilty, and was fined fifty dollars, and judgment therefor and for costs was rendered against him, and an order entered that he be committed to jail until the fine and costs be paid, as provided by the statute, and that in case he be not discharged a warrant of commitment be issued. At the next term Hillier, being called, failed to appear, and the bond was declared forfeited. The defendant herein presented to the sheriff a certified copy of the bail bond, and in writing directed him to arrest Hillier and take him into custody in execution of the judgment, which the sheriff declined to do. At that time, and for a long time after, Hillier could have been arrested by the sheriff. Whether the copy of the bond and the request for the arrest were delivered to the sheriff before the bond was declared forfeited does not clearly appear. It is said in the record to have occurred “shortly after the fine and judgment were assessed against Hillier.” We will consider the fact to be that it occurred before the forfeiture was declared.

The defendant at the trial offered to surrender Hillier, who was in court, in execution of the judgment, and then moved the court to set aside the forfeiture, which was refused, and Hillier was permitted to depart from the court.

II. The bail, in his exoneration, at any time before forfeiture, may arrest and surrender the party indicted to the sheriff upon presenting him with a copy of the bond. Code, §§ 4593, 4594. These statutes require the bail to make the arrest or authorize another to

1. BAIL: exoneration.

The State v. Kraner.

do so; they impose no such duty upon the sheriff. His duty is to receive and detain in custody the party delivered to him. The defendant failed to do the act necessary for his exoneration, namely, arrest and deliver the party to the sheriff. He cannot, therefore, claim exoneration.

III. Code, § 4600, provides that "if, before judgment is entered against the bail, the defendant be surrendered or 2. —: —: arrested, the court may, in its discretion, remit ^{discretion of} court. the whole or any part of the sum specified in the undertaking." Defendant claims that, upon his offer to surrender Hillier at the trial, the court ought to have ordered him into custody and caused the penalty, in whole or in part, to have been remitted. Such a course rested in the sound legal discretion of the court. If it were shown that this discretion was abused, we would reverse; but it does not so appear by the record. We cannot presume that there was any abuse of discretion.

IV. Defendant insists that the sheriff failed to perform his duty in refusing to arrest Hillier in execution of the judgment, and that the bail is therefore exonerated. 3. —: —: ^{officer.} The premise may be admitted, but the conclusion stated does not follow. It was defendant's duty to see that Hillier was arrested, and the law pointed out the way that duty was to be performed. He was in default in not discharging that duty, and for that reason the forfeiture was properly declared against him. The omission of duty by the sheriff is no excuse for his default. Had defendant arrested Hillier and taken him to the sheriff he would have discharged his duty, and if Hillier were then permitted to escape punishment defendant would have been exonerated.

No other questions arise in the case. The judgment of the District Court is

AFFIRMED.

Davis v. The City of Clinton.

DAVIS ET AL. V. THE CITY OF CLINTON.

50	585
107	514
50	585
124	391

1. **Municipal Corporations : STREET : AREA.** A city has the right to impose the conditions upon which an adjacent property owner may be permitted to excavate an area under a sidewalk, and until the conditions it has imposed are complied with, it is authorized to forbid such excavation to be made.

Appeal from Clinton Circuit Court.

WEDNESDAY, APRIL 23.

THE plaintiffs are the owners of a building situated on the corner of Second street and Sixth avenue, in the city of Clinton. During the spring and summer of 1877 they excavated a portion of Sixth avenue opposite the side of said building, and into Second street, to the depth of from six to eight feet, and some eleven or twelve feet in width. The area thus formed was intended for their own private use, in connection with the basement of their building. On the outer edge of the excavation they erected a stone wall, and the purpose and intent was to cover the area thus made in such a way as to make a sidewalk on said streets. After the area was completed on Sixth avenue, and while the plaintiffs were engaged in excavating in Second street, the city council had a meeting and resolved that the work should not proceed unless the plaintiffs would execute a certain written contract, fixing the rights and liabilities of the respective parties growing out of the construction and maintenance of said area. The plaintiffs refused to execute said contract unless modified, and commenced this action to enjoin the city from interfering with the progress of the work. A temporary injunction was allowed without notice to the city authorities. A motion to dissolve the injunction was made upon the answer of the defendants and upon affidavits. The motion was resisted by counter-affidavits upon the part of the plaintiffs. The motion to dissolve was overruled. Defendant appeals.

Davis v. The City of Clinton.

C. W. Chase, for appellant.

Corning & Grohe, for appellees.

ROTHROCK, J.—The defendant is a city of the second class, and was duly organized under the laws of this State. The title in the land platted and dedicated to the public as streets is vested in the city. Code, § 561. “As against the adjoining lot owner or original dedicator, the city has full control over the whole street, and not simply over the surface, and it can maintain an action against any person who, without its permission, removes any material from the body of the street, whether such material be superficial or subterraneous.” *City of Des Moines v. Hall*, 24 Iowa, 234. It follows that if the plaintiffs in this case had the right to excavate the streets, and use a part thereof for their private purposes, it must have been by reason of a grant, permit or license from the city. Whether they had such permission is the question we are required to determine.

It is not claimed that any ordinance or resolution of the city council was in force or had ever been adopted, granting the right to the public, or to these plaintiffs specially, to remove sidewalks and excavate areas adjoining the basement of buildings. It is shown that others have made such excavations and areas under the sidewalks in Second street, and in other streets in the city. Granting that they have the right to maintain them because the city authorities, by silence, permitted them to be excavated—a point, however, which we do not decide—this would not authorize the plaintiffs to make such excavations when forbidden by the proper city authority. Such a rule would practically deprive the city of its control of the streets, and of its right to prohibit such excavations for all time to come. Suppose that before the plaintiffs commenced their excavation in Sixth avenue the city had passed an ordinance prohibiting the excavating of basement

Davis v. The City of Clinton.

areas, the claim that such an ordinance could not be enforced, because before its enactment certain owners of lots had made such excavations, would scarcely be made in a court of justice. If made, its mere statement would be its own best refutation.

We will now proceed to examine what the city authorities did in the way of permitting plaintiffs to make the excavation in controversy, and what was proposed or attempted to be done in the way of interfering with the progress of the work, which plaintiffs made the basis of their application for an injunction.

It is not urged that there was any express permission given. The most that can be claimed is that while the excavation was being made in Sixth avenue and out to the point of intersection with Second street, the city authorities removed the earth taken from the excavation, and, by one of its officers, gave some directions as to how the work should be done. If these acts were done, and no other action was taken by the city, the plaintiffs might, with some show of right, claim that the defendant should be held to be estopped from ordering the excavation to be filled up. But, before any work was done by plaintiff, the city council, on the 17th day of April, 1877, passed the following resolution :

"Resolved, By the common council of the city of Clinton, That the committee on streets and alleys be and are hereby authorized to consult with the owner of Davis block upon a basis for a contract between said city and said owner, by which said owner shall construct a substantial wall under the sidewalk, and near the outer edge thereof, on the east and north sides of said block, at a cost to the city not to exceed the tax against said property, for the improvement of the street on Second street, opposite the Davis block, in the year 1875. Said contract, when agreed upon, to be submitted to the city council for approval or rejection."

We think the record before us shows beyond question that

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the plaintiffs, after the passage of this resolution, and before the commencement of the excavation, were requested by certain members of the city council to enter into a written contract to be submitted to the council for approval or rejection, and that they promised to do so, but neglected it, and entered upon the work.

On the 11th day of June, 1877, the city council passed the following resolution:

"WHEREAS, Complaints have been made that the sidewalk on the east and north sides of the Davis block, situated on the corner of Sixth avenue and Second street, is being constructed above grade, therefore,

"*Resolved*, By the common council of the city of Clinton, that the owner of said block, and all parties engaged in constructing said walk, be and are hereby ordered to construct said walk so as to conform to the grade of sidewalks established in that locality, and if any portion of said wall which is now constructed is not to the grade, that the parties are directed to put the same to grade."

On the 27th day of June a committee of the council therefore appointed made the following report to the council, which was adopted:

"Your committee appointed to confer with Mr. Davis would beg leave to report that Mr. Davis would enter into a written agreement with the city of Clinton to build a good, substantial wall and sidewalk to grade on Second street; also that he (Davis) will hold the city harmless from any surface water running through said walls, he retaining the dirt under said walk. Your committee would recommend that the city enter into said agreement with Mr. Davis."

No written contract was at any time entered into. The plaintiffs proceeded with the work on Sixth avenue until it was completed, and then refused to enter into a written contract.

When the plaintiffs commenced the removal of the sidewalk in front of their building on Second street, and com-

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menced the excavation on that front, the city council caused a written contract to be prepared, and passed a resolution that plaintiffs should not excavate under the sidewalk on Second street until said contract should be signed by them. This contract was presented to plaintiffs, and they refused to execute it unless modified. It was further resolved by the council, "that, if there be no arrangement made with Mr. Davis, the street commissioner be notified to replace the sidewalk in front of the Davis block, put back the dirt, and pack the dirt behind the curbing." Thereupon the plaintiffs made application for and obtained the injunction. That it should have been dissolved we entertain no doubt. That the plaintiffs at all times understood that there was to be a written contract, settling the rights of the parties, is beyond question. With full knowledge of this they entered upon the work. They were not misled by the city council nor any officer of the city. They were in no position at any time to demand that the contract should contain certain stipulations, or to impose any terms whatever upon the city. Instead of complying with the demands of the city, and entering into a contract as required, they proceeded with the work, and now claim a right to do so, and that the city must not interfere with them because the officers thereof, relying on their promises to enter into the contract, did not sooner stop the excavation.

After the cause was submitted to the court below, on the motion to dissolve the injunction, the plaintiffs filed certain stipulations, binding themselves to perform certain acts. This was evidently done to give them a standing in court. Without these stipulations they had no cause of action whatever. We need not set them out nor determine whether they meet the requirements of the city. It does not appear that the city, by its proper officers, approved of such stipulations and assented thereto. If they had given such assent that would have been an end of the controversy. The plaintiffs, as we have found, could not lawfully excavate the streets except by permission of the city, and then only upon such

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conditions as the city should see proper to impose, and no such right could be acquired except by contract, express or implied, with the city. The stipulations filed after the submission of the cause cannot be held to be such a contract.

REVERSED.

CLAYTON ET AL. V. ELLIS ET AL.

50	590
82	3
50	590
107	680
50	590
119	588

- 1. **Judicial Sale: REDEMPTION.** The holder of an unsatisfied balance of a judgment cannot redeem from an execution sale made under the same judgment.
- 2. ——— : ——— : **LIEN.** Real estate which has been sold in part satisfaction of a judgment and redeemed by the judgment debtor does not become again subject in his hands to the lien of the judgment. Overruling *Crosby v. Elkader Lodge*, 16 Iowa, 399.

Appeal from Dallas Circuit Court.

WEDNESDAY, APRIL 23.

ACTION in equity to compel the defendant Ellis, as sheriff of Dallas county, to execute to the plaintiffs a deed of certain land in that county. The land was sold under execution, in pursuance of a decree of foreclosure of a mortgage, and was purchased at the execution sale by the execution creditor, who has since died intestate, leaving the plaintiffs as his heirs. The time of redemption has expired, but the sheriff refuses to execute a deed. The petition shows that he refuses because of the alleged rights of one Ellen Watson, who is made defendant with him. It further shows that the property was purchased at the execution sale by the plaintiffs' ancestor for only a part of the amount of the judgment; that Ellen Watson is the owner of the part unsatisfied; that, within the time allowed for redemption, she paid to the clerk of the court the amount bid, with interest and costs, and claims that a

 Clayton v. Ellis.

redemption was thereby effected by her. These facts having been set out in the petition the defendant Ellen Watson demurred to it on the ground that it showed that she had effected a redemption, and that the plaintiffs were not entitled to a sheriff's deed. The court overruled the demurrer. Defendants appeal.

Barcroft, Given & Drabelle and North & Woodin, for appellants.

White & Varner and Phillips, Goode & Phillips, for appellees.

ADAMS, J.—The question presented is as to whether the holder of an unsatisfied balance of a judgment can redeem from an execution sale made under the same judgment. The appellants insist that he can. Section 3103 of the Code provides that any creditor of the defendant whose demand is a lien upon the real estate may redeem the same at any time within nine months from the day of sale. The defendant Ellen Watson is certainly a creditor of the defendant in execution, and the only question is as to whether her demand is a lien upon the real estate. If so she is entitled to redeem, otherwise not. In *Tuttle v. Dewey*, 44 Iowa, 306, where real property had been sold on execution and bought in by the judgment creditor for a part of the judgment, it was held that a junior incumbrancer could, within the time allowed by statute, redeem from the sale by paying the amount of the bid, and that it was not necessary for him to redeem from the judgment under which the sale was made. This seemed to be in accordance with section 3106 of the Code, which provides that the terms of redemption shall be the reimbursement of the amount paid by the then holder, added to the amount of the redemptioner's own lien. The amount paid by the holder in that case was the amount for which the property was sold. No doubt could

1. JUDICIAL
sale: redemp-
tion.

Clayton v. Ellis.

have arisen in relation to the junior incumbrancer's right to redeem by paying that amount, except for the claim that was made that the unsatisfied portion of the judgment remained a lien upon the land paramount to that of the incumbrancer seeking to redeem. But it was held that the lien was divested by the sale. The same rule was held in *Russell v. Allen*, 10 Paige, 249. It follows that an execution creditor cannot redeem from his own sale. For the same reason an assignee of the creditor could not redeem from the sale. We are satisfied not only that such is the law, but that to allow the execution creditor to redeem would often give him an unfair advantage, and work a great detriment to the debtor.

In the first place it may be observed that the execution creditor does not need the right to redeem from his own sale. He is always in the condition to bid the fair value of the property, if it does not exceed the amount of his claim. If he bids less than the value and less than his claim, it is in view of the contingency of its not being redeemed, and the advantage resulting therefrom. To the other incumbrancers and to the execution debtor a right of redemption is given because they need it for their just protection. The sale may be made without their knowledge. If made with their knowledge it is not made with reference to their convenience. To allow them the right to redeem, while of great importance for their protection, cannot be presumed to work an injury to any one. If, however, the execution creditor is allowed such right, it might easily result in the sacrifice of the debtor's property. The execution creditor could never be expected to bid more than a nominal sum, in the absence of competition. We do not deny that an advantage might sometimes result to the debtor if the execution creditor were allowed to redeem. It might be so in this case, but it is plain to see that it would ordinarily be otherwise. The rule adopted tends to secure a sale of the property at its fair value, and that constitutes the

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debtor's best protection. It is the policy of the law to afford him such protection. *Hays v. Thode*, 18 Iowa, 51.

AFFIRMED.

ON REHEARING.

SEEVERS, J.—A rehearing was granted on the petition of the appellant—not because of the belief that, as an original question, there was error in the foregoing opinion, but because the prior decisions of this court, bearing on the question determined, were seemingly inconsistent with each other. That, logically, there is a conflict in such decisions must, we think, be regarded as true. It was held in *Crosby v. Elkader Lodge*, 16 Iowa, 399, “that if the debtor or his grantee redeem land which had been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution from the moment of such redemption.”

It is obvious this ruling is based on the ground that the unsatisfied balance of the judgment continues to be a lien on the premises after the sale, as against the execution debtor or his assignee. No reasons are stated in support of this holding, but it is bottomed exclusively on *Curtis v. Millard & Co.*, 14 Iowa, 128. In that case the facts were that Gregory, Tilton & Co. recovered a judgment against Downing & Foster, by virtue of which they became the purchasers, at sheriff's sale, in February, 1860, of certain real estate. Afterward, in July, 1860, Millard & Co. recovered a judgment against Downing & Foster, who sold to the plaintiff their right of redemption from the sale to Gregory, Tilton & Co. It was held that the judgment of Millard & Co. was a lien from the date of its rendition on such right of redemption. It will be observed this case has no bearing on the point determined in *Crosby v. Elkader Lodge*, the only question determined being that a judgment constitutes a lien on an equitable title to real estate, and, therefore, the judgment of Millard & Co. was a lien on the equity or right to redeem.

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In *Hays v. Thode*, 18 Iowa, 51, the facts were that Thode obtained a judgment against Elliott, and thereunder became the purchaser at sheriff's sale of certain real estate, the amount of his bid being much less than his judgment. Hays, being a subsequent creditor of Elliott, and entitled to redeem, sought to do so by paying to the clerk the amount of Thode's bid, interest and costs. The latter insisted that Hays could not redeem without paying the amount of the balance due on the judgment under which the land had been sold, but it was ruled otherwise. It is evident this ruling was based on the thought that, as to a junior creditor, the lien of the judgment as to the unsatisfied balance was divested by the sale. This decision is supported by *Dewey v. Tuttle*, 44 Iowa, 306.

The foregoing cases irresistibly lead us to conclude that a distinction has been recognized between the debtor, his assignee and a creditor, and that the terms under which either of the former may redeem are materially different and more burdensome than those applicable to the latter. That such a distinction existed seems to have been recognized by DILLON, J., in *Hays v. Thode*; but as no such point was before the court in that case, what was said relating thereto must be regarded as *dictum*.

It is important, therefore, to determine whether, under the statute, any such distinction can be sustained. It provides that "the terms of redemption in *all* cases will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien." Code, § 3106. The lien referred to must be that of the holder, otherwise the redemptioner must pay the amount of his own lien to the holder before he could redeem. This would be absurd.

If, then, the balance of the judgment is a lien on the premises after the sale, Hays, in the case above cited, could not have redeemed without paying the amount of such lien in addition to the amount of the bid, interest and costs. *Goode v. Cummings*, 25 Iowa, 67.

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The statute applies to all cases, and expressly excludes the thought that the terms of redemption which may be lawfully imposed on the debtor or his assignee are in any respect different from or more burdensome than those of the creditor who may be entitled to redeem.

To say the least, it is logically difficult to reconcile *Crosby v. Elkader Lodge* with *Hays v. Thode* and *Tuttle v. Dewey*. Such being true, we are at liberty to adopt such rule as is deemed to be the proper one under the statute, and we are of the opinion that the better rule is that the lien of the judgment as to the unsatisfied balance on the real estate sold is, as to all persons and in all cases, divested by the sale. This simplifies the law on this subject and uniformity is thereby attained, which is certainly desirable. This view is supported by the statute, which provides that "when the property has been sold in parcels any distinct portion may be redeemed by itself." Code, § 3121. If there remains a balance due on the judgment after the sale which constitutes a lien on the land sold, it is difficult to see how the debtor or his assignee could avail himself of the benefit of this statute except by paying the whole of such balance before he could redeem the most insignificant parcel, for the statute makes no provision as to the apportionment of such balance on the several parcels.

If redemption of the whole or any parcel is made by the debtor, the judgment, to the extent of the balance due thereon, would constitute a lien on the premises in his hands, and they might again be sold on execution based on said judgment. But we see no reason why the debtor may not sell his right of redemption, and his vendee redeem by paying the amount of the bid, interest and costs.

It should be conclusively presumed, for the purpose of redemption, that the purchaser bid therefor all that the property was worth to him. Whether, in case the judgment creditor is the purchaser and the judgment is not fully satis-

Pond v. The Waterloo Agricultural Works.

fied by the sale, he could issue another execution and sell the debtor's right of redemption, we do not determine.

The result is that the conclusion reached in the foregoing opinion is

ADHERED TO.

50	506
85	70
85	305
50	594
138	500

POND V. THE WATERLOO AGRICULTURAL WORKS ET AL.

1. **Promissory Note: CORPORATIONS: FRAUD OF OFFICER.** The board of directors of defendant authorized its president and secretary to negotiate a loan. The treasurer subsequently informed the president that he had negotiated a loan of M. in accordance with the vote of the board of directors. The president thereupon signed certain notes and gave them to the treasurer, with instructions to the latter to get the money before he surrendered the notes. As a matter of fact the treasurer had not negotiated a loan with M., but left the notes in his possession for a time, when they were returned indorsed without recourse. He then took one of them to plaintiff, who was a stockholder of defendant, a director and member of its executive committee, and the plaintiff took the note, giving therefor a certain amount in cash, his own notes for a specified amount, and receipting an account against defendant: *Held*, that notwithstanding the *mala fides* of the treasurer the plaintiff was holder of the note in good faith, and entitled to recover.
2. ———: **USURY.** The plaintiff having paid less than the face of the note the transaction was usurious, and he was entitled to recover only the actual amount of his advances, without interest or costs.
3. **Practice: PRAYER FOR GENERAL RELIEF.** Under a prayer for general relief a judgment may be granted without a specific prayer therefor.

Appeal from Black Hawk District Court.

THURSDAY, APRIL 24.

ACTION to foreclose a mortgage which it is claimed by the defendant was executed, or at least negotiated, without authority; that plaintiff is not a *bona fide* holder thereof, but that he procured the same through fraud and collusion with the officers of the corporation defendant. The defendants further claim that plaintiff is a stockholder in said corporation and

Pond v. The Waterloo Agricultural Works.

is largely indebted thereto for such stock. The District Court found for the plaintiff and entered a decree accordingly. The defendants appeal.

J. L. Husted and Alford & Elwell, for appellants.

Miller & Preston, for appellee.

SEEVERS, J.—I. On or about the 28th of July, 1873, the board of directors of the corporation defendant passed the following resolution: * * * “that it is expedient and it is hereby authorized by this board to create a loan on the real estate of the company, secured by mortgage, for a sum sufficient to pay the present indebtedness of the company as taken from their books, and that the president and secretary be authorized to negotiate said loan on the best terms to the company, and at a rate of interest and commission not exceeding twenty per cent. In case of said loan being taken to execute a mortgage for the same, and in case of a failure to negotiate such mortgage, to notify this board accordingly.”

One Crittenden was the treasurer of said corporation, and on the 7th day of August, 1873, he informed the president thereof that he had negotiated the loan contemplated by the resolution with Edmund Miller. Thereupon the president and secretary of defendant executed eight promissory notes, of three thousand dollars each, payable to Edmund Miller or order, at certain specified dates thereafter, with ten per cent interest from date. Said notes provided in case suit was brought thereon that a reasonable attorney's fee should be allowed and taxed as a part of the costs. To secure such notes a mortgage was properly and legally executed to Miller on the real estate of the corporation.

The president, after signing the notes and executing the mortgage, left them with Crittenden, with directions to be sure and get the money before he permitted them to go out of his possession. As a matter of fact, Crittenden had not negotiated any loan of or with Miller; he, however, took the

notes and mortgage, and left them with Miller, taking his receipt therefor, which stated they were to be "negotiated according to the instructions of Crittenden." But on the same day, and a few hours afterward, Crittenden returned and got the notes and mortgage of Miller, and the latter took up his receipt. At Crittenden's solicitation, Miller indorsed the notes in blank, except that he wrote above his name "Without recourse to me."

There is some evidence tending to show there was some disagreement on this last occasion between Miller and Crittenden, the latter at least making some display of ill feeling toward the former in relation to the loan; but the evidence on this subject is very indefinite. While the evidence is not as clear and certain as it should be, we, however, strongly incline to believe that in the whole transaction with Miller, and the one subsequently with plaintiff, Crittenden was acting fraudulently, and in disregard of the rights of the corporation; but we are unable to find any evidence tending to show that Miller had any knowledge thereof.

Under these circumstances we regard it as entirely clear, if Miller had advanced money on the notes and mortgages, that his title to them would have been clear and perfect.

The plaintiff claims, however, to be the owner of one of said notes, and it becomes necessary to determine his rights, which we proceed to do.

II. On the day of its execution Crittenden delivered the note to the plaintiff with the indorsement of Miller thereon,

as before stated, it being payable on the 1st day of March, 1875. The plaintiff gave Crittenden therefor his note, payable one day after date,

1. PROMISSORY
note: corpora-
tions: fraud of
officer.

for one thousand five hundred dollars; but this was intended as a memorandum of the transaction, more than anything else, until the plaintiff could go to his home and get some money. The actual transaction was that plaintiff should pay Crittenden one thousand and fifty dollars in cash, and receipt an account for three hundred dollars he had against the cor-

Pond v. The Waterloo Agricultural Works.

poration, which he did within a day or two after receiving the note, and give his two notes for seven hundred and fifty dollars each, payable in six and nine months. These last notes were never paid, but were afterward surrendered to the plaintiff, and the same credited on the note sued on. The manner or reason of such return of the notes in no way affects the plaintiff's right to recover for the money actually paid.

The plaintiff, at the time he got the note, was a stockholder, director, and member of the executive committee of the corporation. He had knowledge of the resolution, and that the secretary had reported to the directors that the indebtedness of the company was fifteen thousand dollars, and claims he purchased the note instead of making a loan to the corporation. He so testifies; but this is a legal conclusion, or at least of that nature. The true question is whether, under all the circumstances, it can be so regarded. The plaintiff further testifies Crittenden informed him "that under the instructions given by that resolution the committee had made a mortgage" and notes, * * * * * "and had succeeded in placing them all but one, and that he wanted me to take." Thereupon he paid the money as above stated, receipted the account and received the note.

Crittenden being the treasurer of the company it could not be regarded as strange he had possession of the notes. And while it is true (indorsed, as they were, by Miller) he might be regarded as holding them in the capacity of an individual banker, still we think the plaintiff had sufficient knowledge they were held by Crittenden in his official capacity, and that he was then acting in such capacity for the corporation. The plaintiff must necessarily have so understood from the language used by Crittenden as to the placing of the loan. Besides this, the fact of the acceptance of the account against the company as money has a significant bearing on the point now under consideration. The transaction must be regarded

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as a loan to the defendant, and we think the plaintiff, at the time, must have so understood.

But the defendant insists the plaintiff cannot be regarded as a good-faith holder, and, therefore, is not entitled to recover on the note and mortgage. To charge the holder of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note. Indeed gross negligence, it is said, is not sufficient, and that nothing but fraud is sufficient to destroy the character of the holder as one who acted in good faith. *Gage v. Sharp*, 24 Iowa, 15; *Lake v. Reed*, 29 Iowa, 258; *Collins v. Gilbert*, 94 U. S., 753, where the authorities bearing on this question are largely collected and referred to by CLIFFORD, J.

Tested by this rule, what are the facts which it is claimed are sufficient to charge the plaintiff with notice of the fraud of Crittenden, and which infirmities make him a holder in bad faith? As the plaintiff is in possession the burden is on the defendant.

The resolution, it is urged, provides the loan was to be negotiated by the president and secretary. True, but it does not necessarily follow they could not employ another to make the actual negotiation. All that was intended was that it should be made under their supervision. What mattered it to the defendant who made the negotiation, if the money were obtained according to the terms of the resolution. Certainly a matter of mere form like this should not have the effect to vitiate a transaction otherwise executed in strict accord with the power.

The president testifies Crittenden informed him he had negotiated the loan of Miller. Whereupon the president and secretary, without inquiry as to the truth of what Crittenden had said, executed the notes and mortgage and left them with Crittenden, "to be kept in his safe until he got the money on them."

Crittenden, therefore, was rightfully in possession, with

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power to negotiate with Miller; at least, there is no evidence tending to show that the plaintiff had any knowledge whatever of the Miller transaction, or of the instructions of the president other than what Crittenden informed him. The plaintiff knew Crittenden was treasurer of the defendant; he knew of the resolution, and found the notes and mortgage purporting to be executed in pursuance of the resolution in Crittenden's hands as such treasurer, and he gave Crittenden the amount of money before mentioned and received the note. Suppose that the plaintiff had given Crittenden three thousand dollars in cash and received the note; could it be successfully claimed he should not recover? Now the actual transaction is in no wise different from this, unless fraud or bad faith can be inferred therefrom.

It is urged the mortgage was to be negotiated before the loan was effected. This is mere form, and must be so regarded. The thing to be accomplished was to obtain a loan of money, and it could make no possible difference whether it was obtained before or after the mortgage was executed.

It is insisted the plaintiff knew the secretary reported the indebtedness to be fifteen thousand dollars. This is true, but does the fact that notes were executed for twenty-four thousand dollars have any tendency to show he is not a holder in good faith. We think not. He had no personal knowledge of the indebtedness, and the resolution does not state the amount to be borrowed. The plaintiff might, therefore, well suppose the necessities of the defendant had been found to be greater than was anticipated. There is no pretense that the president acted fraudulently in executing notes for the amount he did, or that he intended any wrong in leaving them with Crittenden. On the contrary it seems to be conceded on all hands he acted in the utmost good faith. We are unable to find that any one acted in bad faith except Crittenden. The testimony fails to show otherwise. If the real fact is otherwise it is the defendant's misfortune.

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The amount of the plaintiff's recovery remains to be determined.

III. That the plaintiff is entitled to recover one thousand three hundred and fifty dollars must be conceded. Whether he can recover anything more depends on the question whether the loan is tainted with usury.

2. — : usury. The note bore ten per cent interest from date, and is for three thousand dollars. It is not claimed that plaintiff gave Crittenden more than two thousand eight hundred and fifty dollars, including his own notes. The transaction is, therefore, usurious unless it is brought within the rule established in *Gokey v. Knapp*, 44 Iowa, 32.

In that case it was held when an agent loaned money at usurious rates it would not be presumed he had authority to make the loan on such conditions, and as the principal did not authorize such a rate of interest to be taken the loan as to him was not tainted with usury. There is no such question here. The plaintiff made the loan in person, and under the guise or name of commission exacted more than ten per cent interest per annum. This cannot legally be done. The plaintiff is entitled to a judgment for one thousand three hundred and fifty dollars, without interest or costs, and a foreclosure of the mortgage and a judgment must be entered against the defendant in favor of the school fund, as provided by law.

IV. The District Court found the plaintiff was the owner of two thousand dollars of the stock of the defendant, on which only four hundred dollars had been paid. It is insisted the court below should have made some provision in the decree by which the plaintiff could be compelled to pay for said stock out of the money found due him, and as said court failed to do so we are asked to render such a decree.

The defendants took no appeal from that part of the decree. On the contrary, expressly excepted so much of the decree as related to the stock from the appeal; nor did the plaintiff appeal from that or any other portion of the decree. That

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part of the decree is not, therefore, before us. We are able to give the defendants all the relief they are entitled to on the appeal taken and pending before us, without in any manner interfering with that portion of the decree below relating to the stock.

The cause will be remanded to the District Court with directions to enter a decree in accordance with this opinion.

MODIFIED AND AFFIRMED.

ON REHEARING.

DAY, J.—I. Upon the petition of defendants a rehearing was granted upon so much of the foregoing opinion as is contained in the fourth point discussed, holding that the defendants took no appeal from the decree in so far as it failed to offset the amount found due the plaintiff on the note sued on, with the amount due the defendant from plaintiff on his two thousand dollars of stock. It is claimed by appellant, in the petition for rehearing, that the opinion, in this respect, misapprehends the real condition of the record. The plaintiff filed a reply to the petition for rehearing, and the question involved is again submitted for determination.

The conflicting views of counsel respecting the state of the record render necessary a more extended statement of it than is contained in the foregoing opinion. The defendants filed a cross-bill, in which, among various matters of defense to the note sued on, it is alleged "that about March or April, 1873, plaintiff purchased of W. J. Ackley, a stockholder of defendant, two thousand dollars of the capital stock of defendant, upon which twenty per cent, or four hundred dollars only, had been paid, and that same was properly transferred to plaintiff upon the books of the company, and that he thereupon became liable, and is still liable, to defendant and its creditors on said stock in the sum of one thousand six hundred dollars."

The defendants pray "for judgment for costs, and for

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decree declaring said notes and mortgage void, and cancelling said mortgage and the record thereof, and that the rights of all the defendants be determined and settled thereby, and for general relief."

The plaintiff filed a reply in which he "denies allegations of fifteenth paragraph, except that plaintiff avers he purchased of said Ackley two thousand dollars of twenty per cent stock, which was not transferred to plaintiff on the books of defendant; that afterward, by an agreement with directors of defendant, said stock was surrendered to defendant, and four hundred dollars full paid stock issued to plaintiff therefor."

The court rendered judgment for plaintiff against the defendant Waterloo Agricultural Works for one thousand six hundred and thirty-one dollars and twenty-five cents; "and the court further found that the action of the board of directors of said defendant Waterloo Agricultural Works, in taking up and cancelling two thousand dollars of its assessable stock held by plaintiff, and issuing to plaintiff four hundred dollars in full paid stock in lieu thereof, was and is null and void; and the court therefore ordered, adjudged and decreed that said two thousand dollars of stock so purporting to have been cancelled be, and the same is declared to be, in force and belonging to said plaintiff, O. M. Pond."

The record further recites as follows: "On the 6th day of April, 1877, the defendants Waterloo Agricultural Works and W. J. Ackley perfected an appeal to the Supreme Court of Iowa from said judgment, and so much of said decree as relates to the foreclosure of the mortgage described in plaintiff's petition, being all of said judgment and decree except that part of the same that relates to the two thousand dollars of stock of the plaintiff, finding that the action of the board of directors of the defendant in canceling said stock was null and void, and declaring the same to be in force and belonging to plaintiff, by serving upon the plaintiff and clerk of the District Court of Black Hawk county a notice of appeal to that effect; * * * * * and on the 12th day

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of July, 1877, the plaintiff perfected an appeal to the Supreme Court of the State of Iowa, from so much of said judgment and decree as refused to allow plaintiff ten per cent interest and attorney's fee, as provided for in the note and mortgage sued on, by serving * * * * * a notice of appeal to that effect."

It is apparent, from the record as above set out, that the defendants appealed from every part of the decree which was adverse to them, and that they excepted from their appeal only that portion of the decree which held void the action of the board of directors in issuing to plaintiff four hundred dollars of full paid stock in lieu of the two thousand dollars of partially paid stock held by him, which portion of the decree was favorable to defendants.

II. The plaintiff insists, however, that in the cross-petition there is no prayer for judgment for the amount which
 3 PRACTICE: prayer for relief. may be found due the defendant on the stock of plaintiff, and that, therefore, the court did not err in neglecting to grant any relief respecting it. This proceeding, however, is in equity. The cross-petition prays for general relief. Under this prayer any relief which is consistent with the allegations of the cross-petition, and sustained by the proof, may be granted.

III. The plaintiff further insists that the defendant did not plead the claim for unpaid balance of stock as a counter-claim, as provided in section 2659 of the Code. It is evident that this section refers to pleadings in an action at law. Section 2660 applies to pleadings in a proceeding in equity, and provides that "an equitable division must also be separated into paragraphs, and numbered as required in regard to an equitable cause of action in the petition." The cross-petition was so separated and numbered. See section 2646, subdivision 6. If there was any defect in the mode of separation and numbering it should have been assailed by motion.

IV. The court decreed that the two thousand dollars of stock purporting to have been cancelled be declared to be in

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force, and belonging to plaintiff, O. M. Pond. From this decree the plaintiff prosecuted no appeal. It is claimed, however, that the evidence does not show a transfer of the shares upon the books of the company, as provided in section 1078 of the Code and the defendant's articles of incorporation, and that the transfer is, therefore, valid only as between the parties in this case, the plaintiff, and the defendant W. J. Ackley. The decree of the court, however, is general, and finds that the stock belongs to O. M. Pond, establishing thus his ownership against the Waterloo Agricultural Company Works, as well as against the assignor, Ackley. There was evidence introduced to support this finding, and, as plaintiff has not appealed from this portion of the decree, we cannot now review the evidence as to a transfer of the stock on the books of the corporation.

V. The plaintiff holds two thousand dollars of the stock of the corporation, upon which it appears that but four hundred dollars has been paid. The articles of incorporation were entered into in August, 1872, and provide that twenty per cent of the stock subscribed shall be paid each year, at such time as may be required. The sale of the two thousand dollars of stock was made to plaintiff in March, 1873. Twenty per cent thereof had then been paid. The answer and cross-petition were filed in October, 1876. At that time all the instalments upon the stock were due and subject to demand. The indebtedness of the corporation is shown to be from ten to twelve thousand dollars. The plaintiff is legally liable to the corporation for eighty per cent of stock owned by him, amounting to one thousand six hundred dollars. This should be set off against the one thousand three hundred and fifty dollars which the plaintiff is entitled to from the defendant, and for the balance, three hundred and fifty dollars, the defendant should have judgment. When the affairs of the corporation are wound up, the relative rights of the stockholders may be adjusted between themselves in an action to which they all may be made parties. The cause will be remanded to the

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District Court, with directions to enter a decree in accordance with this opinion.

REVERSED.

HUMPHREY V. THE PATRONS' MERCANTILE ASSOCIATION.

1. **Corporation: AMENDMENT OF ARTICLES: RECORDING OF.** Where a corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape the obligation of the contract by setting up a want of record of the amended articles.
2. ———: **UNAUTHORIZED INDEBTEDNESS.** Private corporations are responsible at least to the extent of the consideration received for indebtedness assumed to be contracted in excess of the limit imposed by the articles of incorporation.
3. ———: **ACTS OF AGENTS: CONTRACT.** An acceptance by a corporation of the benefits of a contract, with knowledge of the fact that such contract, but for such acceptance, would not be binding upon it, will constitute an adoption of the contract, and render the corporation liable upon it

• *Appeal from Black Hawk District Court.*

THURSDAY, APRIL 24.

THE plaintiff avers that in March, 1874, he took charge and management of defendant's business, which consisted of a retail grocery store in Waterloo, Iowa; that there was then a large amount of indebtedness due and owing by defendant to various parties for goods purchased by it; that to pay off such indebtedness, at the request and by the direction of defendant, plaintiff borrowed for the use of defendant, and used in paying off such indebtedness, one thousand dollars, for which plaintiff agreed in writing to and did pay, by direction of defendant, ten per cent interest per annum, which money was borrowed June 10, 1874, as will more fully appear by reference to a copy of the note given by plaintiff therefor, which is attached as exhibit "A;" that plaintiff has paid said note in full; that there is now due him thereon (after allowing as

50	607
82	290
50	607
107	585
50	607
117	201

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credit two hundred and forty-two dollars and forty-six cents) nine hundred and eighty-four dollars and fifty-four cents, with interest at ten per cent from September 20, 1876, and asking judgment accordingly.

The defendant, in its answer, "admits that plaintiff acted as its general agent, as alleged. Avers that plaintiff was at same time an officer of defendant, as well as its general agent; that at the time of the alleged loan in question, and of the payment of the proceeds thereof for the use of defendant, said defendant, its officers and agents were not authorized to borrow money on its account, but were expressly prohibited therefrom by one of its articles of incorporation, which was in words and figures as follows: 'Article 4. The business of this association shall be conducted on a cash basis.' And defendant avers that in making said loan plaintiff acted without authority. Denies that defendant or its board of directors authorized plaintiff to borrow said money, and denies that said board had authority to authorize said loan. As to whether plaintiff made the loan and applied the proceeds as stated in his petition, defendant has not knowledge sufficient to form a belief."

Other facts are stated in the opinion. There was a trial by jury and verdict for the plaintiff. Defendant appeals.

Boies & Couch, for appellant.

Miller & Preston, for appellee.

ROTHROCK, J.—I. At the June Term, 1878, of this court an opinion was filed in this cause reversing the judgment of the court below. A petition for rehearing was filed within the proper time, upon an examination of which a rehearing was ordered, a reargument was had, and the cause has again been submitted for our consideration.

Upon a careful re-examination of the original abstracts and arguments, in connection with the arguments upon re-

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hearing, we have arrived at a conclusion different from that announced in the former opinion.

II. It is urged by appellant that it had no power to incur any liability to the plaintiff. Its want of power is based upon the fact that the articles of incorporation provided that the business of the company should be conducted upon a cash basis. But it appears that after the adoption of the articles, and upon the same day, amended articles were adopted, which allowed the company to borrow money to the extent of two thousand dollars; that the article originally adopted requiring the company to conduct its business upon a cash basis was omitted in the amended articles, and the power of the company to incur indebtedness was limited to two thousand dollars. It does not clearly appear whether notice of the amended articles was published, but no question of that kind is presented in this court, and none appears to have been raised in the court below. The amended articles were recorded, but not until after the transaction in question. It is urged, therefore, by the appellant, that they were not in force at the time of the transaction in question. In support of this view our attention is called to section 1065 of the Code, which provides that no change shall be made in the articles of incorporation "unless recorded as the original articles are required to be." But it appears to us that this provision was made for the protection of those with whom the corporation might deal. Such persons might, doubtless, in a proper case, set up the fact that the amended articles were not recorded. But, where the corporation has assumed to make a contract authorized by the amended articles, and has received the consideration, we do not think it can be allowed to escape the obligation of the contract by setting up a want of record of the amended articles. This principle was substantially decided in *Grape Sugar & Vinegar Mfg. Co. v. Small*, 40 Md., 395.

III. Another objection urged by the appellant to the

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plaintiff's recovery may be stated as follows: The amended
2. ———: un- articles, as we have seen, provide that the com-
authorized
indebtedness. pany's indebtedness shall be limited to two thou-
sand dollars. The fact, however, is that at the time of the
transaction in question the company had purchased goods on
credit to the amount of three thousand dollars, and they had
not been paid for. Now it is contended that, if the company
had the power to incur indebtedness for goods, it had already
incurred as much indebtedness as was authorized, and could
not incur any more. Upon this point it is sufficient for us to
say that there was evidence tending to show that plaintiff,
who was the managing agent of the defendant, used at least
a part of the money for which recovery is sought, in paying
for the goods which had been purchased on credit. Now, if
the defendant's liability arose from the mere fact that it had
the use and benefit of the plaintiff's money in the payment
of previous indebtedness, which seems to be one theory of
the plaintiff, then the same act which created an indebted-
ness to the plaintiff extinguished a like amount of indebted-
ness to some one else, and the indebtedness was not increased.
But it is contended that, of the three thousand dollars indebt-
edness previously existing, at least one thousand dollars of it
was illegitimate, and that it does not appear that the money
in question was used in paying only that which was legitimate.

In our opinion, however, the limit imposed by the amended
articles upon the company's power to contract indebtedness
would not necessarily have the effect to exempt the company
from liability for indebtedness assumed to be contracted in
excess of the limit. It has been held, it is true, that a mu-
nicipal corporation is not liable for indebtedness assumed to
be contracted in excess of the limit fixed by the constitution.
Carter v. City of Dubuque, 35 Iowa, 416. But we know of no
case where a private corporation has not been held, at least
to the extent of the consideration received, for indebtedness
assumed to be contracted in excess of the limit imposed by
the articles of incorporation. There is good reason for mak-

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ing a distinction between municipal and private corporations in this respect. The creditor of a municipal corporation may, far more properly than the creditor of a private corporation, be required to take notice at his peril as to when the limit is reached..

If a municipal corporation has occasion to contract indebtedness, other than by way of current expenses to be met by current revenue (see *Grant v. City of Davenport*, 36 Iowa, 396), it is something exceptional. It is not only a matter of local public interest, but a matter of local public notoriety. Besides, the indebtedness must be contracted through prescribed formalities, and the action of the municipal officers should be made, and, it may be presumed, ordinarily is made, a matter of public record. A private corporation incurs indebtedness daily, and that, too, which is not to be offset by prospective current income, but which helps swell the indebtedness to which the limitation applies. It incurs the indebtedness in the transaction of its ordinary business, and through its various agents. No specific formal action of its directors in advance would ordinarily be practicable. Its records, therefore, so far as they may be presumed to be accessible to creditors, would not ordinarily show, even if well kept, more than an approximation at a given time to the corporate indebtedness; nor has it any officer charged by law with the duty of keeping a record of the indebtedness, or of any action through which the indebtedness was contracted. Unless, therefore, the corporation is estopped from setting up the limit where the consideration has been received, it would properly be without credit, the very thing for which private corporations largely are organized. This result is to be avoided, if it can be consistently with the protection which the limitation is designed to afford to stockholders, and we think it can be. The stockholders must be regarded as at least partially protected by the receipt of consideration, and if not fully so in every case, they may doubtless have an action (or the corporation may, which

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represents their interest), against the officers or agents who, without authority, have imposed upon them a liability which has resulted in their loss.

In this connection it is proper that we should say, for the purpose of guarding our decision, that if the defendant's indebtedness for goods had been contracted before the amended articles had been adopted, and while the article was in force providing that the business of the company should be conducted upon a cash basis, a different question would be presented.

That such indebtedness would be invalid there would be far more reason to contend, because the presumption would be that the creditors knew that the defendant was not authorized to do business upon credit. Whether indebtedness in such a case should be held invalid there appears to be some conflict of authority, and we are not called upon to determine it. By the amended articles the prohibition was removed. The limit of indebtedness was fixed at two thousand dollars. Within that limit it was authorized to do business upon credit, and although the limit, as appears, was exceeded, yet we are of the opinion, in view of the importance of upholding corporate credit and protecting creditors who have parted with their property in ignorance of the fact that the limit had been exceeded, that the corporation should be estopped from setting up such fact. We conclude, then, that the defendant was liable for the goods bought; and the money advanced by the plaintiff, so far as it was used in paying for the goods, was used in paying obligations which the defendant could not have escaped.

It is contended, however, that even if this is so the plaintiff should not recover, because it appears that he was a guilty agent who contracted the excessive indebtedness. But we do not think that the defendant can complain of the plaintiff's unauthorized acts unless it was damaged, and no claim of that kind is made.

IV. The foregoing is a copy of part of the opinion here-

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tofore filed, as prepared by Mr. Justice Adams, and concurred
3. ———: acts in by all the members of the court. We still
of agent: con-
tract. adhere to the view therein expressed. The judgment was reversed by reason of what we then considered an erroneous instruction given by the court to the jury. The instruction is in these words:

“4. In this country it is now settled that all duties imposed on corporations aggregate by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. Hence, if you shall find from the evidence that the directory, while they were assembled together as such, did not contract with the plaintiff, as claimed, but that they had adjourned to the bank to give their individual notes to it for the debts of the defendant; and while on their way plaintiff suggested to them that he could raise for the defendant the one thousand dollars he claims to have advanced, and they consented thereto; yet, inasmuch as the whole benefit of the contract resulted to the corporation, and it has been known by it and accepted by it, then you may legally infer an adoption of the contract, and such an acceptance as would make the defendant liable herein for the sum so advanced or borrowed by plaintiff for the use of defendant in paying its debts, if you find from the evidence the corporation used the money knowingly, and accepted said sum with such knowledge. Promises may as well be implied from the acts of the agents of a corporation as if it had been an individual.”

The ground upon which it was held in the former opinion that the foregoing instruction was erroneous was that no contract of any kind is averred in the petition, except that which is expressed in the promissory note given by the plaintiff to the party of whom he borrowed the one thousand dollars; and that plaintiff claims what is due him is due him on the note, and as the note calls for ten per cent interest, there was no evidence that any of the directors authorized the plaintiff to borrow money at that rate of interest.

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We now think there are two grounds upon which this instruction should have been approved: *First*, it was not urged in argument by appellant that the instruction was not pertinent to the issue presented in the pleadings; and, *second*, it was a mistake to say that the plaintiff sought to recover on the note. The defendant was not a party to the note, and of course there could be no recovery against it upon the note. But an examination of the petition and answer, copies of which are set out in the statement of facts preceding this opinion, shows that plaintiff brought the action upon a contract with the defendant, authorizing him to borrow money for its use. The note having been paid, is merely set out as showing the amount. It does not appear from the pleading whether this contract was in writing or by parol. The evidence shows that whatever there was in the way of a contract was by parol.

It appears from the evidence that a meeting of all of the directors of the defendant was held on the day the plaintiff gave his note to the bank for the one thousand dollars. As to this meeting the plaintiff testifies:

"I told them (the directors) I would become responsible for one thousand dollars, if they would take six hundred dollars. They said they would do it, and so we went over to the bank. Farmington, Carpenter, Farnsworth, Gardner, Washburn, (directors) and myself went over. Mr. Leavitt (the banker) said if we wanted money we must give our personal notes. He let us have the money and took our notes there and then. I said to Leavitt that I was to become responsible for one thousand dollars for the use of the company, and the others would be responsible for six hundred dollars. Both notes were executed in the presence of us all. * * * * * I checked out the one thousand six hundred dollars borrowed in payments of debts of defendant in three days after it was borrowed. I paid its indebtedness as far as their funds would go."

All the evidence tends to show that this meeting of the directors was called for the very purpose of devising some

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means to relieve the defendant from pressing obligations. The one thousand six hundred dollars raised upon the two notes was the result of the deliberations of that meeting.

Now we do not understand from the testimony of the directors, who gave their note for six hundred dollars, that they were ignorant of the fact that the plaintiff also gave his note for one thousand dollars. That he was to raise one thousand dollars to relieve the defendant of its debts seems to be conceded. No one claims that this was to be a gift to the defendant. It appears to us that there was sufficient in the evidence to warrant the court in not only instructing the jury that they might infer an adoption of the contract from the acts of the parties, as set out in the instruction, but that such act constituted an express contract, authorizing the plaintiff to borrow money to pay defendant's debts, and for which defendant was liable. The statement to the jury that a contract might be inferred, if certain facts were found to be established by the evidence, when such facts amounted to a contract, was not error prejudicial to the defendant.

The fact that plaintiff in his petition claims ten per cent interest does not affect the contract or obligation to pay the one thousand dollars. The contract between the plaintiff and defendant not being in writing, the legal rate of interest would be six per cent per annum. Code, § 2077. But the plaintiff, in his petition, claimed ten per cent. The defendant, in its answer, did not specially aver that the interest claimed was unauthorized.

The court, in its sixth instruction to the jury, directed that, if plaintiff was entitled to recover, interest should be computed at ten per cent. No exception was taken to this instruction, and no assignment of error is made thereon. Under these circumstances we must affirm the judgment as it stands. The plaintiff asks that judgment be rendered in this court against the sureties in the *supersedeas*. This is uniformly done, when asked in proper time, and judgment will be so entered.

AFFIRMED.

Millard & Co. v. West.

MILLARD & Co. v. WEST ET AL.

1. **Mechanic's Lien: PRIORITY OF LIENS.** L. gave a bond for deed to W., and afterward, W. having meanwhile assigned the bond to his wife, executed to the wife a new bond. Prior to the execution of the latter, however, a mechanic's lien accrued upon the interest of W. in the land in favor of M. & Co., of which L. had no notice: *Held*, in an action to foreclose the lien, that the claim of L. was prior thereto, and that the decree should provide for its payment in full, free from the contingency of any reduction by the costs of the foreclosure proceeding.

Appeal from Des Moines District Court.

THURSDAY, APRIL 24.

In the year 1872 the defendant Leebrick, being the owner of a lot in the city of Burlington, executed an agreement with one Tate to sell the same to him, upon payment of a certain sum. Afterward Tate, not having paid the purchase money, sold his interest in the property to the defendant Dean West, and in December, 1874, Leebrick executed to said West a new bond for a deed, agreeing to convey the lot to him upon payment of three hundred and fifty dollars, and interest. Afterward said West, not having paid the purchase money, assigned the bond to the defendant Louisa West, who assumed the payment of the balance due. On the 20th day of September, 1875, Leebrick executed to Louisa West a new bond for a deed, providing for the payment of the balance of the purchase money, and another sum loaned her—the amount altogether being six hundred and twenty-five dollars, drawing ten per cent interest. In June, 1876, Louisa West surrendered her bond to Leebrick, not having paid anything thereon, and Leebrick took possession of the property

In June, 1874, the plaintiffs sold to Dean West and Louisa West one hundred and eighteen dollars' worth of lumber, which was used in the erection of a building upon said lot. Said

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lumber was delivered at different times from June 9 to December 5, 1874. The plaintiffs filed a claim for a mechanic's lien on the 15th day of November, 1875. When Leebrick made his title bond to Dean West, and subsequently to Louisa West, he had no knowledge of plaintiffs' claim.

The plaintiffs brought this action to foreclose their mechanic's lien. Upon the foregoing facts the court found that plaintiffs were entitled to a mechanic's lien for one hundred and twenty-eight dollars and twenty-nine cents, and that there was due to Leebrick seven hundred and eighty-five dollars and forty cents, for which he had an equitable lien on said realty for the purchase price and cash loaned. It was decreed that a special execution issue; that said property be sold, and the funds arising therefrom be distributed as follows: *First*, in payment of costs; *second*, in payment to Leebrick of the amount found due him; and, *third*, in payment of plaintiffs' claim.

Leebrick asked the Court to require plaintiffs to pay off the amount due as purchase money by a short day before plaintiffs should sell the lot, and if not paid the right of sale to be barred, or that the costs of sale should be taxed against plaintiffs, if the sale did not bring enough to pay off the purchase price of the lot. The court declined to do this.

The decree was entered October 20, 1877. Afterward, Leebrick ordered a special execution for the sale of the property under the decree. The plaintiffs filed a motion to require the sheriff to return the execution because—"First, it was not issued on demand of the party entitled thereto; *second*, Leebrick has no judgment or lien which can be satisfied on execution issued on his behalf, the property levied upon being his; *third*, to sell now would annihilate plaintiff's claim, real estate being low in the market." The motion was sustained, and the execution was ordered returned at Leebrick's cost. On the hearing of this motion, no evidence by affidavit or otherwise was introduced. Defendant Leebrick appeals.

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Hall & Baldwin, for appellant.

Blake & Hammack, for appellees.

ROTHROCK, J.—Leebrick has at all times since his agreement with Tate been the holder of the legal title to the lot in controversy. At the time the lumber was furnished Dean West had an equitable interest, under the bond for a conveyance, upon the payment of the purchase money. The plaintiffs were entitled to a mechanic's lien upon that interest, but Leebrick, having no notice of the lien, and before the same was filed, made a new bond to Louisa West. It is not claimed by appellees that the mechanic's lien is superior to the lien of Leebrick. It is correct, as claimed by counsel for appellees, that plaintiffs had the right to foreclose the mechanic's lien, and if they had made no other parties than those against whom they held the lien, they might have foreclosed and sold their equity; but when they made Leebrick a party defendant, they had no right to a decree for the sale of the whole title to the property, without either providing for the payment of the costs of the sale in case it did not sell for enough to pay the claim of Leebrick, and the cost, or paying off Leebrick's claim before taking special execution for the sale of the property. In other words, Leebrick is entitled to payment in full of his claim without costs, before plaintiffs can, by a sale, deprive him of his title.

The decree should have been such as to fully protect him in the payment of his claim without the contingency of its being reduced by the costs of a sale. This decree and the ruling upon the motion to order in the execution, if allowed to stand, would permit the plaintiffs to order an execution at any time within the statute of limitations, and if the property should not sell for enough to pay Leebrick and the costs of sale he must, in effect, pay the costs; and in the meantime, while he is waiting the pleasure of the plaintiffs

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to enforce the decree, if he improve the property it must be at his peril. The decree should have required the plaintiffs to pay off Leebrick's lien before proceeding with a sale of the property, and, in the event of their failure to pay within a time to be named, their mechanic's lien should have been barred.

REVERSED.

THE DAVENPORT FIRE INS. CO. v. MOORE.

1. **Insurance : LIABILITY UPON PREMIUM NOTE.** Where the charter of an insurance company authorized it to conduct its business wholly or in part upon the mutual principle, or wholly or in part upon the cash principle, and a policy recited that the insurance in question was made in consideration of a certain specified sum as cash premium, and an instalment note payable absolutely at specified times, *held*, that recovery could be had upon the notes without proof of losses and an assessment as upon the mutual plan.
2. ——— : **COMPANY MAY REINSURE.** It is competent for an insurance company to reinsure upon its risks, and it may transfer its property, including premium notes, as a consideration therefor.
3. ——— : **CONSTRUCTION OF STATUTE.** A failure to comply with the provisions of chapter 138, Laws of 1868, will not prevent a company from indemnifying itself by reinsurance for risks already assumed.

Appeal from Black Hawk Circuit Court.

THURSDAY, APRIL 24.

On the 15th day of February, 1876, the plaintiff commenced this action as the assignee of a note executed by the defendant, as follows :

"For value received on policy No. 1503, dated the 5th day of September, 1868, issued by the Cedar Valley Insurance Company, of Cedar Falls, Iowa, I promise to pay said company the sum of

"Six dollars on the 1st day of September, 1869;

"Six dollars on the 1st day of September, 1870;

"Six dollars on the 1st day of September, 1871;

"Six dollars on the 1st day of September, 1872;

without interest. By default in the payment of either of the above instalments, each of the others shall become due."

The defendant answered as follows:

"1. Admits the execution and delivery of the note.

"2. Avers that he made the same to the Cedar Valley Insurance Company in consideration of a policy of insurance marked 'Schedule A,' and annexed hereto, and made a part of the answer.

"3. Avers that said insurance company, at the date of said note and policy, was a corporation organized under the laws of this State, and was then doing business under articles of incorporation, a copy of which is attached, marked 'Schedule B,' and made part of the answer.

"4. That on and prior to the 1st day of January, 1869, the capital stock of said company was less than fifty thousand dollars, and said company had not at that date agreements of insurance with two hundred persons, nor did the premiums upon all its agreements for insurance amount to twenty-five thousand dollars.

"5. That said company, at and prior to the said 1st day of January, 1869, had no capital of any kind, except premium notes received by it from parties insured in said company, which notes were of the same general character as that described in the petition, and were received in consideration of policies of insurance issued by it, of the same character as that set forth herein. A large proportion of said policies were in force on the day aforesaid.

"6. That said company never complied with any of the provisions of chapter 138, Laws of Iowa of 1868, and after the 1st day of January, 1869, ceased doing business as an insurance company.

"7. That plaintiff is an insurance company organized under the laws of this State prior to January 1, 1869, and prior to that date did comply with the provisions of chapter 138, Laws of Iowa, 1868.

"8. That April 23, 1869, the Cedar Valley Insurance

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Company transferred, so far as it had power or authority, all the premium notes received in the course of its business to the plaintiff, including the note in suit, in consideration of which plaintiff undertook and agreed to assume and carry all risks theretofore assumed by said Cedar Valley Company, and to indemnify said company against all claims for losses under or by virtue of any of its policies of insurance theretofore issued, which transaction is the only basis of plaintiff's right or title to the note in question.

"9. That defendant was not a party to said transaction, and never in any manner authorized or assented thereto, but from the time such transaction came to his notice has wholly refused to accept of any insurance by plaintiff, and has wholly repudiated the action of said the Cedar Valley Insurance Company in the transaction aforesaid with plaintiff.

"10. That defendant fully paid the Cedar Valley Insurance Company for carrying the risk assumed in its said policy aforesaid, for one year from the date thereof, at the time of the delivery of such policy, and he avers that, by its failure to comply with the provisions of chapter 138 of Laws of 1868, so as to be able to continue its said business, it forfeited all right to the subsequent instalments secured by said note, of which fact plaintiff had notice at the time of its pretended purchase.

"11. Defendant, further answering, avers that the policy of insurance so issued to him by the Cedar Valley Insurance Company was issued upon the mutual plan, and none other; that said company never organized as a stock company; that it never had any capital stock with which to transact business as a stock company, nor had it any means with which to pay losses, except the premium notes of its policy holders, of like character with that in suit; and he avers that no losses have happened to those insured in said company, and no assessments have been made upon the several parties insured so as to entitle said company or its assigns to maintain any action at law upon the note in suit.

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"12. Defendant further states that the pretended transfer of the note in question was wholly outside of the authority of said the Cedar Valley Insurance Company, after it had failed to comply with the provision of chapter 138, Laws of 1868, and was a fraud upon its policy holders, who were thereby rendered wholly remediless, as against said company, for any loss that might occur to them, for the reason that such assignment was a transfer of all the property of said company, all of which was well known to plaintiff at the time of such pretended transfer."

The policy of insurance attached to this answer has the following heading:

"THE CEDAR VALLEY INSURANCE COMPANY.

"CHARTERED A. D. 1850.

"*MUTUAL.*

"CEDAR FALLS, IOWA."

It contains, with many other of the ordinary provisions of a policy of insurance, the following:

"The Cedar Valley Insurance Company, in consideration of six dollars cash premium, and an instalment note of twenty-four dollars, do insure Lorenzo Moore, during the term of five years.

"This company shall not be liable for any loss if default shall have been made by the assured in the payment of any instalment of premium due upon the instalment note aforesaid of the assured, for the space of thirty days after such instalment shall become due by the terms of such note; *provided, however*, that on payment by the assured, or assigns, of all instalments of premium due under this policy and the instalment note given thereon, the liability of the company shall again attach, and this policy be in force from and after such payment.

"If the cash premium shall be unpaid in such case this policy shall be void, and assured shall not be entitled to recover from the company any loss or damage which may occur to the prop-

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erty hereby insured. When a promissory note is given by the assured for the cash premium, it shall be considered a payment, provided such note is paid at or before maturity; but it is expressly understood and agreed by and between the parties hereto that should any loss or damage occur to the property hereby insured, and the note given for the cash premium, or any part thereof, remain unpaid and past due at the time of such loss, then this policy shall be void.

"It is further provided that no attempt, by law or otherwise, to collect any note given for the cash premium, or any instalment of premium due upon any instalment notes, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy; but upon payment by the assured, or his assigns, of the full amount due upon such note, and costs, if any there be, the policy shall be thereafter in full force; and if, in the opinion of the company, an over-insurance exists, or the risk be increased by any means, or if from any cause the company elect so to do, the company reserves the right of canceling the policy by paying to the assured the unearned premium, if any there be. This policy is made and accepted upon the above express conditions, and the charter and by-laws of the company, which are to be resorted to and used to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for, and which are hereby made a part of the policy."

In no place in the policy is the assured denominated a member of the company, nor does the policy in any place speak of any assessment to be made or required upon any note of any description. The policy in no place contains the words "premium note."

The charter, which is attached as an exhibit to the answer, contains, among other things, the following provisions:

"Said corporation shall have power to make insurance, of every name and nature, against loss or damage by fire, water, or any other cause. It may also insure the lives of its mem-

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bers and others. It may also make insurance on live stock against accident, death or disease; and may cause itself to be insured, in whole or in part, as to any risk taken by said company. The capital stock of the corporation may consist of such premium notes and cash premiums as may be taken from time to time for policies of insurance issued by said company, not exceeding two million dollars; and the directors may, for the better security of its policy holders, at any time add a cash or subscribed capital of any amount, not exceeding one million dollars, to be secured and liable for the indebtedness of the company, as the by-laws of the corporation may provide.

“The business of said corporation may be conducted wholly or in part on the mutual principle, or wholly or in part on the cash or stock principle, as the directors may determine.

“At the annual election for directors each member shall be entitled to one vote for each one hundred dollars by him, her or them insured.

“The members of this company shall be and are hereby bound and obligated to pay their proportion of all losses and expenses happening and accruing during the time for which their policies were issued, to the amount of their premium note or notes and cash premium, and no more.

“The said company may divide applications for insurance into two or more classes, according to the degree of hazard, or the nature and kind of insurance to be effected; and the premium note shall not in such case be assessed for the payment of any loss, except to the class in which it belongs. All and every person or persons who shall at any time become interested in said company by insuring therein upon the mutual plan, and also their respective heirs, executors, administrators and assigns continuing to be insured therein, shall be deemed and taken to be members thereof, for and during the term specified in their respective policies, and no longer; and shall at all times be concluded and bound by the provisions of this chapter.

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"The directors of this company may make an assessment upon the premium notes given to said company, whenever they, in their judgment, shall think it necessary or expedient, in order to be able to meet its liabilities with promptness."

The plaintiff filed a demurrer to this answer, which the court sustained.

The defendant elected to stand upon his answer, and judgment was rendered for the plaintiff. The defendant appeals.

Boies & Couch, for appellant.

Hemenway, Polk & Thorp, for appellee.

DAY, J.—I. It is claimed that the insurance in question was effected upon the mutual plan, and that there
1. INSURANCE:
liability upon
premium note. can be no recovery without proof of losses, and an assessment of the amount payable by defendant. The answer alleges that the policy in question was issued to the defendant upon the mutual plan, and none other. If this allegation stood alone, it would be admitted by the demurrer. But to the answer copies of the charter of the company and of the policy of insurance are attached. These become parts of the answer, and in connection with the note sued on, the execution of which the answer admits, must be considered in determining the effect to be given to this allegation. The charter of the company authorizes it to conduct its business wholly or in part upon the mutual principle, or wholly or in part upon the cash principle. The policy recites that the insurance is made in consideration of six dollars cash premium, and an instalment note of twenty-four dollars. The liability of the company is made to depend upon the payment of the instalments of the note as they fall due. Nothing is said about an assessment of losses to the insured. The note sued upon is payable absolutely in instalments, at specified times. We think the character of the insurance must be determined by the charter, the note and the policy, and that these show that the insurance in

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question was not effected upon the mutual plan. The allegation in the answer that the insurance was made upon the mutual plan is contradicted by the admissions in, and the exhibits attached to, the answer, and is not, therefore, well pleaded. It is not admitted by the demurrer. The authorities cited by appellant upon this branch of the case (*White v. Haight*, 16 N. Y., 310; *Mygatt v. New York Protection Insurance Co.*, 21 N. Y., 52; and *Howland v. Edmonds*, 24 N. Y., 307) do not, we think, support a view contrary to that above announced.

II. The answer alleges: "that April 23, 1869, the Cedar Valley Insurance Company transferred, so far as it had power or authority, all the premium notes received in the course of its business to the plaintiff, including the note in suit, in consideration of which plaintiff undertook and agreed to assume and carry all risks theretofore assumed by said Cedar Valley Company, and to indemnify said company against all claims for losses under or by virtue of any of its policies of insurance theretofore issued, which transaction is the only basis of plaintiff's right or title to the note in question."

Appellant urges that, independently of chapter 138, Laws of 1868, the Cedar Valley Insurance Company had no authority to transfer the note in question to plaintiff, in the manner above alleged. The argument of the appellant is based upon the idea that the Cedar Valley Insurance Company is simply a mutual company. As, in the view we take of the case, the insurance of defendant was not effected under the mutual plan, the reasoning of the appellant is not applicable. It is true that the Cedar Valley Insurance Company could not, without the consent of the defendant, transfer its liability to the plaintiff, and compel the defendant to accept the plaintiff as his insurer. But the charter of the Cedar Valley Insurance Company authorizes it to cause itself to be reinsured as to any risk taken.

It is competent for an insurance company to effect rein-

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insurance upon its risks. Flanders on Insurance, 30; Angell on Fire and Life Insurance, 20; Clarke on Insurance, 263. What the answer alleges to have been done by the Cedar Valley Insurance Company amounts, in legal contemplation, to reinsurance upon its risks. As the Cedar Valley Insurance Company had the right to effect such insurance, it was competent for it to pay the plaintiff for the risk assumed by the transfer to plaintiff of any property to which the said company had the absolute right. As the Cedar Valley Insurance Company owned the note in question, we can see no valid reason why it might not transfer the note to plaintiff.

III. It is urged further that the transfer is invalid under chapter 138, Laws of 1868. Section 3 of this act provides 3. — : construction of statute. that no joint stock company shall be incorporated with a smaller capital than fifty thousand dollars, of which not less than twenty-five thousand dollars shall be paid up in cash; and that no company on the mutual plan of insurance shall commence business until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars, of which at least five thousand dollars shall have been paid in actual cash. Section 26 provides that any insurance company, before the passage of the act, organized under the laws of this State, shall conform to the provisions of the act by January 1, 1869, and when necessary shall change its charter to comply with said act, and makes it a penal offense for the officers or agents of a company to do business without complying with the act. Section 28 makes it the duty of the Auditor of State, when he shall deem it expedient, to appoint one or more persons to examine into the condition of any insurance company doing business in this State, and authorizes him, when it shall appear from such examination that the assets are reduced or impaired more than twenty per cent below the paid-up capital stock required by the act, to communicate the fact to the Attorney General, whose duty it shall be to apply to the

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Supreme Court, or a judge thereof, for an order requiring said company to show cause why their business should not be closed; and, in case it shall appear that the interests of the public require it, the court or judge shall decree a dissolution of the company and a distribution of its effects.

The answer alleges that on and prior to January 15, 1869, the capital stock of the Cedar Valley Insurance Company was less than fifty thousand dollars, and that it did not have agreements of insurance with two hundred persons. Because of the failure of said company to comply in this respect with the provisions of chapter 138, Laws of 1868, it is claimed by the appellant that it was not competent for the said company to effect reinsurance, or transfer the note in question in consideration thereof. It does not, however, appear that any steps were taken, as authorized in the act, to close the business of the Cedar Rapids Insurance Company. The law itself did not have that effect. It made it penal for the officers of the company to do any more business as an insurance company. They could not, until the law was complied with, take any more risks. But they were not, we think, inhibited from indemnifying the company by reinsurance for risks already assumed. The taking of such reinsurance was not, as we understand it, violating the provisions of the act as prescribed in section 28 thereof.

We are of the opinion that the demurrer to the answer was properly sustained.

AFFIRMED.

Wilson v. Breeding.

WILSON V. BREEDING.

1. **Husband and Wife: EXEMPTION FROM EXECUTION.** Personal property of the wife, exempt from execution in her hands, does not at her death vest in her husband, but goes to her administrator.

50 629
87 195

Appeal from Madison Circuit Court.

THURSDAY, APRIL 24.

ACTION at law to recover the value of certain personal property taken and appropriated by defendant, which plaintiff claims belonged to him. The cause was submitted to the court without a jury, and a finding of facts made upon which a judgment was rendered for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

McCaughan & Dabney, for appellant.

Wainwright & Miller, for appellee.

BECK, CH. J.—I. The petition alleges that in October, 1876, one Alexander Blair died intestate, leaving a widow, Martha Blair, to whom plaintiff was married in February, 1877, and that in December, 1877, she departed this life. It is averred that when Blair died he was possessed of certain personal property, described in the petition, to which his widow became entitled, and of which she was actually in possession at the time of her death. Other property described in the petition, it is alleged, plaintiff and his wife acquired after their marriage. It is shown that after the death of plaintiff's wife defendant took out letters of administration upon the estate of Alexander Blair, and as such reduced all the property described in the petition to his possession and disposed of the same, though he had notice that plaintiff claimed ownership thereof.

The answer of defendant admits that he is the adminis-

Wilson v. Breeding.

trator of the estate of Alexander Blair, and alleges that he has duly accounted for the property held by him as such. Other allegations of the petition are denied. By an amended answer, setting up a counter-claim, it is shown that plaintiff converted to his own use certain other property belonging to the estate of Alexander Blair, for which judgment is claimed against him. The allegations of the answer were denied.

The court found the following facts:

"1. That in Madison county, Iowa, on October 5, 1876, Alexander Blair died intestate.

"2. That the said Alexander Blair left, as his widow surviving him, one Martha Blair.

"3. That on February 23, 1877, the said Martha Blair, widow of Alexander Blair, intermarried with plaintiff, James Wilson.

"4. That in Madison county, Iowa, on December 5, 1877, the said Martha Wilson (formerly Martha Blair) died intestate, leaving plaintiff, James Wilson, as her surviving husband.

"5. That on December 7, 1877, defendant was appointed administrator of the estate of Alexander Blair.

"6. That on December 7, 1877, defendant, as administrator of the estate of Alexander Blair, took possession of the property in controversy herein, and on January 14, 1878, sold the same, and reported the proceeds of said sale in his report as administrator aforesaid.

"7. That on January 12, 1878, plaintiff caused a written notice to be served upon defendant, notifying him that plaintiff claimed to be the absolute owner of the property in controversy, protesting against a sale thereof, and demanding immediate possession thereof.

"8. That of the property in controversy one cow and one calf, of the value of thirty-one dollars, were the absolute property of James Wilson, and never had been the property either of Alexander Blair, Martha Blair, or Martha Wilson.

"9. That of the property in controversy certain articles,

Wilson v. Breeding.

of the total value of three hundred and fifty-five dollars, had, during the life of Alexander Blair, been his property.

"10. That each of the articles mentioned in the ninth finding herein were, under the laws of Iowa, exempt from execution in the hands of said Alexander Blair.

"11. That during her life-time the widow of Alexander Blair reduced to actual possession each of the articles mentioned in the ninth finding herein.

"12. That each of the articles mentioned in the ninth finding herein were exempt from execution in the hands of Martha Blair, afterward Martha Wilson, during her life-time, under the laws of Iowa.

"13. That prior to the death of Martha Wilson, and after marriage to James Wilson, there came into the hands of said James Wilson personal property to the value of one hundred dollars, which had been the property of Alexander Blair during his life-time.

"14. That the property mentioned in the thirteenth finding herein was taken into actual possession by the widow of Alexander Blair before it went into the hands of James Wilson, and was property which was exempt from execution, under the laws of Iowa, while in the hands of Alexander Blair.

"15. That James Wilson obtained the property mentioned in the thirteenth paragraph hereof from the widow of the said Alexander Blair, after his marriage to her, and after said property was reduced to actual possession by her."

As a conclusion of law, based upon the facts found, the court held that plaintiff was entitled to recover three hundred and eighty-six dollars, and allowed that amount as a claim against the estate of which defendant is administrator.

II. It will be observed that there are three classes of property involved in this suit as shown by the findings of the court below—*First*, property of plaintiff, which never belonged to his wife or her former husband, mentioned in the eighth finding of facts. There can be no question of plain-

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tiff's right in this action to recover the value of this property. *Second*, property formerly owned by Alexander Blair, deceased, of which plaintiff has taken possession, referred to in the ninth, tenth, eleventh and twelfth findings of facts. *Third*, property formerly belonging to Alexander Blair, deceased, taken by plaintiff, and which has not come into the possession of the defendant.

III. The facts as shown by the proceedings of the court below, so far as they relate to the second class of property, are briefly these: The property belonged to the
1. HUSBAND
and wife: ex-
emption from
execution. estate of Alexander Blair, and was exempt from execution. The statute provides that the property, "after being inventoried and appraised, shall be set apart" to the widow as property in her own right, and shall "be exempt in her hands as in the hands of the deceased." Code, § 2371.

Counsel discuss the question whether the widow acquires the title to the property before it is "inventoried and appraised," and set apart to her. In the view we take of the case this question need not be here decided.

It is also insisted by counsel for defendant that as this property, under our decision in *Van Doran v. Marden*, 48 Iowa, 186, was not held by the widow exempt from her own debts, it did not, upon her decease, become the property of her husband. We need not pass upon the question, for we reach a conclusion upon a different ground, which we will now state.

We find no statute providing that property of the wife, exempt from execution in her hands, shall upon her death vest in the husband. Of course, in the absence of a statutory provision of that character, such property must be distributed under other provisions of the law.

It is provided that personal property, exempt from execution in the hands of a husband, shall upon his death vest in his widow. Code, § 2371. This section bestows a right upon a widow, but not upon a husband of a deceased wife, nor can it be extended by construction to confer a right upon him.

Wilson v. Breeding.

Counsel for plaintiff insists that this provision is made applicable to a husband of a deceased wife by Code, § 2440. But this cannot be admitted. The last named section is confined by its express words to provisions of the chapter in which it occurs, which relate to real estate exclusively. The parallel section of the revision—amended by chapter 151, Acts Ninth General Assembly, § 2479—is also by its very terms confined to provisions relating to real estate. From the report of the Code commissioners it is discovered that they so understood the provisions in question, and doubtless such was the understanding of the Legislature enacting the Code.

We conclude that the plaintiff in this case, upon the death of his wife, did not become entitled to the property in question, and that under the statute it could not have been set apart to him as his property. It was subject to distribution under the provisions of law applicable to personal property, and, therefore, should have gone into the hands of the administrator. The facts of the ninth, tenth, eleventh and twelfth findings do not in law authorize plaintiff to recover for the property referred to therein.

IV. Waiving the question whether the administrator in a proceeding, as this is, to establish a claim against the estate, may set up and recover on a counter-claim, we are of the opinion that, if it be admitted such proceeding is proper, the thirteenth, fourteenth and fifteenth findings are not sufficient to authorize a judgment against the plaintiff. These findings fail to show that plaintiff converted the property to his own use, as is alleged in defendant's counter-claim. They show that the property came into his possession and nothing more. It is not made to appear that he refused to deliver it to defendant, or that he did not actually deliver it to defendant, or that it was not used by him for the benefit of his wife. The fact that he obtained possession of the property from his wife will not alone render him liable; conversion thereof must appear in order to charge him for the value. We con-

The Singer Manufacturing Co. v. Rawson.

clude that defendant is not, under the findings of the court, entitled to recover upon his counter-claim.

V. As we have said, the right of plaintiff to recover the value of the property mentioned in the eighth finding of facts cannot be doubted. This property never belonged to his wife or to her first husband. It was taken by defendant as administrator and converted to the use of the estate, as shown by the sixth finding of facts. Plaintiff is entitled to recover the value of the property, thirty-one dollars, in this action. This, however, is the limit of his right.

The judgment upon the eighth, thirteenth, fourteenth and fifteenth findings of facts is affirmed, and reversed upon the ninth, tenth, eleventh and twelfth. The cause is remanded to the court below for a judgment upon the findings of facts in accord with this opinion. The costs of the appeal will be paid by plaintiff.

REVERSED.

THE SINGER MANUFACTURING CO. v. RAWSON ET AL.

1. **Mortgage:** THREAT OF CRIMINAL PROCEEDINGS. A mortgage executed by the wife to secure a debt of the husband, under the inducement of false and fraudulent charges of embezzlement against the husband, and threats to institute criminal proceedings against him, is void.
2. ———: ———. The fact that the mortgaged property was purchased by the husband with the money of the party making the threats, and fraudulently conveyed to the wife, would have no tendency to show the mortgage valid.

Appeal from Buena Vista Circuit Court.

THURSDAY, APRIL 24.

THIS is an appeal from a ruling sustaining a demurrer to, and dismissing a petition for, a new trial. The trial was in an action brought to foreclose a mortgage executed by the defendant Millie L. Rawson, to secure certain alleged in-

The Singer Manufacturing Co. v. Rawson.

debtedness of her husband, Charles E. Rawson. Defense was made in the action upon the ground that the defendant Millie was wrongfully induced by the plaintiff to execute the mortgage. The alleged wrongful acts consisted in charging her husband falsely and fraudulently with having embezzled the plaintiff's money, and in threatening to institute criminal proceedings against him, and in causing her to be frightened by reason of such charges and threats. Upon the trial the defense was adjudged to be sufficient and the mortgage was decreed to be void.

The petition for a new trial is based upon the ground of newly discovered evidence. The plaintiff alleges that since the trial it has discovered evidence tending to show that the mortgaged property was purchased with funds belonging to the plaintiff, and fraudulently conveyed to the defendant Millie, and also evidence tending to show that she admitted that she signed the mortgage voluntarily, and also evidence tending to show that she was not under the influence of her husband, but that he was under her influence and domination. The defendant Millie demurred to the petition upon the ground that it does not show diligence, and that the evidence, if obtained, would be immaterial. The court sustained the demurrer. The plaintiff appeals.

Robinson & Milchrist and Phillips, Goode & Phillips, for appellant.

Aplington & Allen and Galusha Parsons, for appellee.

ADAMS, J. We do not think it material whether the defendant Millie was under the influence of her husband or not.

1. MORTGAGE: If she was induced to execute the mortgage by
 threat of
 criminal pro-
 ceedings. false and fraudulent charges of embezzlement,
 and threats to institute criminal proceedings
 against him, the mortgage was void. Nor is it material that
 she admitted that she signed the mortgage voluntarily, if her

Fish v. Wolfe, Carpenter & Angle.

volition was gained by such false and fraudulent charges and threats.

As to the evidence that the mortgaged property was bought with the plaintiff's money and fraudulently conveyed to her, we think it may be said that it would have no tendency to show the mortgage valid. Upon a proper proceeding to reach the property as held in trust for plaintiff, such evidence would be clearly admissible, and perhaps such proceeding may yet be instituted.

The petition for a new trial, we think, was properly dismissed.

AFFIRMED.

FISH V. WOLFE, CARPENTER & ANGLE ET AL.

1. **Contract: CONSTRUCTION OF: RAILWAY GRADING.** A contract for grading a railway provided that the company might relocate its road, and change the grade line if deemed expedient; that whether the work became greater or less by any change that might be made, the contractors should be paid only for the actual work done. The work was divided into sections so as to make the excavation and embankment in each as nearly equal as possible. The line was changed after the contract was made so that a certain number of feet, consisting of excavation, were included in a section wherein they were paid only for embankment: *Held*, that plaintiff, having been once paid for his work, could not demand payment upon a sectional division which would give him more.

Appeal from Wapello Circuit Court.

THURSDAY, APRIL 24.

THE defendants Wolfe, Carpenter & Angle contracted with the Burlington & Missouri River Railroad Company to build a portion of its road, including sections 79 and 80. Afterward they sublet the building of the sections named to the plaintiff Fish, and the defendant Neely. During the prog-

Fish v. Wolfe, Carpenter & Angle.

ress of the work Fish & Neely took in as a partner the defendant Darlin, and did business under the firm name of Fish, Neely & Co. About the time of the commencement of the work the railroad company made a slight change in the location of the road. A change was also made in the length of sections. What was established as section 79 in the relocated road was made about thirteen hundred feet shorter than the corresponding section in the original survey, while the new section 80 was made about that much longer than the original section 80.

The plaintiff claims that the division between the sections should have been so placed that thirteen hundred feet now embraced in section 80 would have been embraced in section 79, and that the work should be measured and paid for as if the division had been so placed. A controversy in regard to the division between the sections arose between Fish, Neely & Co. and Wolfe, Carpenter & Angle, and was not settled at the time the work was completed. In the meantime Neely and Darlin became apprehensive in regard to the solvency of Wolfe, Carpenter & Angle, and were anxious to arrive at a settlement, and obtain payment of the amount confessedly due. In their anxiety to do so they agreed to give, and did give, upon being paid such amount, a receipt in full, in the name of Fish, Neely & Co., for all work. This was done, however, against the protest of the plaintiff, of which Wolfe, Carpenter & Angle had, at the time, full knowledge. This action was brought to compel Wolfe, Carpenter & Angle to settle with Fish, Neely & Co. for the alleged unpaid balance, and also to adjust some matters between the plaintiff and Darlin. The court found that upon a correct settlement of the amount called for under the contract between the parties there appeared to be an unpaid balance of three thousand two hundred and ninety-seven dollars and sixty cents, and decreed that Wolfe, Carpenter & Angle pay one-third of that amount to the plaintiff. Wolfe, Carpenter & Angle appeal.

Fish v. Wolfe, Carpenter & Angle.

Stiles & Burton and Watkins & Williams, for appellants.

Stubbs & Leggett and H. B. Hendershott, for appellee.

ADAMS, J.—While Fish, Neely & Co. were paid by the cubic yard, and the same price in both sections, it would have been to their advantage if the division between the sections had been so placed that thirteen hundred feet of what is now embraced in section 80 had been embraced in section 79. The advantage would have consisted in the fact that the work would have been estimated more favorably to Fish, Neely & Co. Nothing was estimated in section 79 except excavation, and nothing was estimated in section 80 except embankment. Now it happened that in the thirteen hundred feet in question the excavation far exceeded the embankment. It was for the interest, therefore, of Fish, Neely & Co. that the work in the thirteen hundred feet should be estimated in excavation rather than embankment. The plaintiff claims that the sections in the relocated road should have been made coterminous with the respective sections in the original survey. If this had been done it appears that the thirteen hundred feet in question would have fallen in section 79, and the work therein would have been estimated in excavation.

After the work had been let the company could not, of course, require different work to be done, or the acceptance of a mode of measurement less favorable than that originally agreed upon, unless there was something in the contract which authorized the company to make a change. The appellants contend that there was.

The essential provisions of the contract relative to the question in issue were, in substance, that the company might relocate its road and change the grade-line if deemed expedient; that whether the work became greater or less by any change that might be made, the contractors should be paid only for the actual work done, and at the regular prices, ex-

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cept that if the average haul was increased the contractors should be paid one cent per cubic yard extra for every hundred feet of extra haul; that for grading the contractors should be paid thirty-two cents per cubic yard; that in estimating the grading they should be allowed only once for the movement of the earth or rock, that is, either as embankment or excavation, and not both for the same earth or rock; that in a given section they should be allowed for that one which exceeded the other in that section, and that the chief engineer of the company should determine which.

It appears from the evidence that upon this road, as upon others, the sections were made for the convenience of letting the grading; that they were generally made each about a mile in length, but sometimes longer and sometimes shorter; that the design is to embrace in each section, as nearly as practicable, the same amount of excavation and embankment, so that a section can be let singly to a contractor, and the grading be done without much borrowing or wasting; that upon the relocation of this road it was found necessary, in order to embrace about the same amount of excavation and embankment in each section, to make section 79 much less than a mile and section 80 much greater. It resulted that the thirteen hundred feet in question, which would have ordinarily been embraced in section 79, was thrown into section 80. But it appears that, notwithstanding section 80 was lengthened so as to include the thirteen hundred feet, consisting mostly of excavation, that section contained an excess of embankment, and, notwithstanding section 79 was shortened so as to exclude the thirteen hundred feet, that section contained an excess of excavation.

The plaintiff claims to be aggrieved because the division between sections 79 and 80 was not so placed as to make the excess of excavation in one, and excess of embankment in the other, still greater. It is not claimed by him that Fish, Neely & Co. have not been paid for all their work once as their contract provided. The mode of estimating neces-

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sarily gave them that. Indeed, if the earth excavated upon section 79 in excess of embankment was used to construct embankment upon section 80, they have been paid twice for such work. The only result of placing the division between the sections where the plaintiff claims it should have been would have been to give Fish, Neely & Co. double pay for still more work.

Now we see nothing in the contract which justifies this claim. The plaintiff insists that, under their contract, they, Fish, Neely & Co., were entitled to a job not less advantageous than they would have had if there had been no relocation and no disturbance of sectional divisions. To this we think it may be said, that when they agreed that a relocation might be made, and that a mode of measurement should be adopted that should, as nearly as practicable, pay them once, and only once, for their work, they precluded themselves from insisting upon a sectional division that should work an entirely different result. Besides, if we should concede that, in the relocation, they were entitled to a division between their sections that would have made their job not less advantageous than it would otherwise have been, it does not follow that the sections should have been made coterminous with the respective sections in the original survey. No two lines of road, even near together, would have precisely the same cuts and fills. To give Fish, Neely & Co. the same excess of excavation in one section, and the same excess of embankment in the other, would necessarily have required a change in length. Indeed, the decree of the court below was not based upon the idea that Fish, Neely & Co. were entitled to have the sections in the relocated road made coterminous with the respective sections in the original survey. The court found that, if they had been so made, Fish, Neely & Co. would have been allowed for nine thousand two hundred and nine cubic yards, for which they were not allowed. But that fact was not made the basis of the decree. The decree was based upon a fact

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that had no reference to the preservation of identity of length of sections.

The court found that Fish, Neely & Co. should have been allowed for ten thousand three hundred and five cubic yards more than they were allowed. But what length of section would have given that allowance no witness undertakes to state, and probably no one could have stated.

The decree was based solely upon the ground that Fish, Neely & Co. were entitled to be allowed for ten thousand three hundred and five cubic yards more of excess of excavation in section 79, because there was that amount more of excess of excavation in the corresponding section in the original survey. The fact was found from the testimony of one Lalor. He said: "Section 79 was (in the original survey) five thousand three hundred feet long. The change (in sectional division) was made to equalize, approximately, the quantities of excavation and embankment in each section. The difference would amount to ten thousand three hundred and five yards less on the profile as it is than as it was originally."

Now, if Fish, Neely & Co. were entitled to a job under their contract not less advantageous than they would have had if there had been no relocation, and no change of sectional divisions, it does not follow that the decree can be sustained. No detriment was suffered by the change, unless there would have been an advantage in grading the original section 79, by reason of the excess of excavation which would have been in it, and we are unable to say that there would have been. As we understand it, there is not necessarily an advantage to be derived from an excess of excavation. Under some circumstances it seems clear that an advantage would arise. If an adjacent section has an excess of embankment, and the two are let together to the same contractor, and can be graded together without regard to the division between them, and the earth derived from excess of excavation in one can be used for excess of embankment in the other, then, to that

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extent, the same work would be measured as excavation in one section, and embankment in the other, and be paid for twice. When, however, in case of excess of excavation earth is to be wasted, and in case of excess of embankment earth is to be borrowed, as must always be the case where a section is graded by itself, and sometimes where it is not, the work would be paid for but once, and we see but little, if any, advantage in the excess. To what extent, if any, it would have been necessary to waste in the original section 79, if it had been graded, the evidence does not show. If we can infer anything from the profile in evidence it appears to us that it would have been necessary to a large extent.

REVERSED.

HALE V. THE FIRST NATIONAL BANK ET AL.

1. **Judgment: NOTICE.** Where, in an action to set aside a judgment on the ground that it was rendered without service upon the defendant, the petition set out the decree, which recited that there had been service of notice, such finding was presumed to be correct, in the absence of proof to the contrary.
2. ——— : **AGREEMENT TO SELL.** A contract to purchase a judgment for an agreed consideration does not give the party agreeing to purchase it such a property therein that he can incumber it, as between him and the party proposing to sell, and a third party purchasing the interest of the judgment creditor takes it free of any equities save those growing out of the original contract.

Appeal from Washington District Court.

THURSDAY, APRIL 24.

ACTION in equity to set aside a judgment recovered in the said court by A. T. Salter on the foreclosure of a mortgage executed by the plaintiff, and to have the mortgage and the indebtedness secured thereby declared satisfied. The bank,

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claiming to have obtained all the rights of Salter, insisted upon the validity of the judgment as one *in rem*, and, conceding it was not personal, claimed the right to have it made so.

George H. Hale was, by proper pleading on the part of the bank, made a defendant, and certain relief was asked against him.

The relief asked by the plaintiff was refused, and that asked by the bank was in substance granted. The plaintiff appeals.

H. & W. Schofield, for appellant.

McJunkin, Henderson & Jones, for appellees.

SEEVERS, J.—I. The ground upon which it is sought to set aside the judgment is that notice of the pendency of the action was not served on or given the defendant therein and plaintiff in this.

1. JUDGMENT: notice.

The averments in the petition in relation to the service of notice are as follows:

"2. That there was no personal service of notice in said action, and no appearance of petitioner thereto, as shown by the records in said action, the same referred to above.

"3. That November 15, 1872, on the back of an original notice in said cause an affidavit was made in words and figures following:

" 'AFFIDAVIT.

" 'I. A. H. Patterson, one of the attorneys for the plaintiff in this cause, on my oath say that service of the within notice cannot be made on the defendant Wm. C. Hale in the State of Iowa, he not being a resident of said State.

" 'A. H. PATTERSON.

" 'Subscribed and sworn to before me by A. H. Patterson, November, 15, 1872.

" 'C. T. JONES, Clerk D. C.'

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"4. Which was filed, as shown by the records, in words following:

" 'Filed November 15, 1872.

" 'C. T. JONES, Clerk D. C.'

"5. That there was a publication of notice, as shown by the record, to which reference has been made, in which printed notice the note is described as for \$125.00, instead of \$12,500.00, as set out in the petition; and the affidavit of publication filed in said cause, appearing of record, is in words following:

"6. 'I, John Wiseman, on oath, say I am editor of the *Washington Gazette*, a newspaper published weekly in the city of Washington, Washington county, Iowa; that the original notice hereto attached was published four consecutive weeks in said paper, the first publication being November 1, 1872, the last November 22, 1872.

" 'JOHN WISEMAN.

" 'Subscribed and sworn to before me January 20, 1873.

" 'A. H. PATTERSON, Notary Public.'

"7. Connected with which is the printed slip containing said notice as published, and the above and foregoing is all the record or showing with reference to the original notice or the service thereof.

"8. That from the foregoing the said court in said cause assumed jurisdiction over the mortgaged premises."

The answer admitted the foregoing allegations to be true, and no testimony was introduced in relation thereto. The judgment or decree was incorporated into and made a part of the petition, and it contained the following statement: "This cause came on to be heard, and, it appearing that the defendant was duly served with notice of the pendency of this cause, and he, being three times solemnly called, comes not, but wholly made default," etc.

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The allegations of the petition are that there was no personal service of notice, and no appearance, and that the record shows there was a notice published, and that the record fails to show the service of any other notice, and that therefrom the court assumed jurisdiction of the mortgaged premises. All this is admitted by the answer, but nothing more.

It is not alleged in the petition in clear and distinct terms that no other notice was published, nor that the court did not have before it other evidence of service than is stated in the petition. No such matters are, therefore, admitted in the answer. It devolved on the plaintiff to allege and prove that no notice was served or published. Instead of doing this, the decree, which was a part of the petition, stated that the court found there had been service of notice. It must be presumed the court inquired and advisedly made the finding aforesaid. It is the duty of the court before entering a default, where there is no appearance, to inspect the record and determine whether notice has been given as required by law. Code, § 2870.

The fact that the record now fails to show any other evidence of service than above indicated does not meet the necessities of the case. The record may not be full and complete, or the evidence before the court, or a portion of it, may have been lost or mislaid. In short, the presumptions are all in favor of the finding of the court, and the party claiming the fact to be otherwise must allege and clearly prove such fact. *Woodbury v. Maguire*, 42 Iowa, 339, and authorities there cited; *Nash v. Church*, 10 Wis., 312; *Gimmel v. Rice*, 13 Minn., 40; *Boswell v. Sharp*, 15 Ohio, 447.

We do not determine what would be the rule if the petition had alleged no other notice than therein stated had been served, and the record, upon being introduced, had shown no other. No such case is before us.

II. The plaintiff and Salter owned jointly the "Hale ele-

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vator mill property." The mortgage executed by plaintiff to
2. —: agree- Salter, and which was foreclosed in 1873, was
ment to sell. on the undivided one-half of said property. In
1874 Salter and George H. Hale entered into a written contract
whereby it was agreed that the former had sold to the latter
the said property, and also the judgment against the plain-
tiff rendered on the foreclosure of said mortgage, amounting
to sixteen thousand five hundred and thirty-four dollars and
seventy-five cents, with interest at ten per cent from its ren-
dition, "and for the purpose of carrying out the above con-
ditions fully, Salter agreed to make, execute, acknowledge
and deliver into the hands of Messrs. Patterson & Rheinart,
as an escrow, a deed of release and quit-claim of the real
estate above described, and to execute, acknowledge and
deliver into the hands of the same parties a transfer of the
judgment heretofore recited, and all rights of action against
W. C. Hale upon the cause of action embraced in said action.
All of said instruments to be delivered by said Patterson &
Rheinart to George H. Hale, on his fully complying with the
covenants herein written and on his part to be performed."

George H. Hale agreed to pay for said property, rights
and credits seven thousand five hundred dollars. There was
two thousand dollars paid in cash, and the balance was to be
paid in three yearly payments.

What is called a supplementary contract was made after-
ward, but on the same day, between George H. Hale and Sal-
ter, as is claimed. This contract was not signed by Salter,
but by "Patterson & Rheinart," "A. T. Salter's attorneys."
We are unable to discover any authority Patterson & Rhein-
art had to execute said contract, and thereby bind Salter.
We doubt if it was so intended. But whether it was or not,
we are unable to see that it in any respect changes or affects
the rights of the parties.

George H. Hale took possession of the elevator property,
and, it is claimed, he and the plaintiff entered into a verbal
contract, whereby it was agreed the latter should work and

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labor for one year for the former, and in consideration thereof George H. Hale agreed to satisfy the Salter judgment. The labor was performed. The estimated value thereof was one thousand dollars.

During the time the plaintiff was so laboring, or afterward, George H. Hale became indebted to the bank, and, as security therefor, he assigned to the bank the Salter contract and all rights he obtained thereunder. The two last amounts agreed to be paid Salter were unpaid, and the bank paid the same, and Salter conveyed the real estate directly to the bank, and assigned to it the said judgment and cause of action on which it was based. The bank had no notice of the alleged contract between the plaintiff and George H. Hale.

The plaintiff claims the bank took the judgment subject to the equities existing between the two Hales, and, therefore, he is entitled to have the judgment satisfied. On the other hand, it is claimed the bank succeeded to all the rights of Salter, and cannot be charged with such equities, and this latter view seems to us to be the correct one.

George H. Hale never in fact owned the judgment. He had simply made a contract to purchase the same, and only upon complying therewith would he become such owner. George H. Hale had no power to incumber the judgment as between him and Salter, and it must be presumed the bank so knew, and contracted accordingly. When it got Salter's title it stood in his shoes, and not in those of George H. Hale. The latter was a mere instrument the more readily to enable the bank to get Salter's title, and it was chargeable with the equities only between George H. Hale and Salter.

III. It is claimed the mortgagor, W. C. Hale, surrendered the possession of the premises to the mortgagee, and he is, therefore, entitled to rents and profits. No such claim is made in the petition. The testimony as to the value of the rents is exceedingly meager. The decree of the court makes no allusion thereto. We, therefore, are of the opinion

 Benjamin v. The District Township of Malaka.

this point is made for the first time in this court. The case made in the petition is based on an entirely different theory. We are, therefore, not disposed to disturb the decree below in this respect.

AFFIRMED.

50	648
78	552

50	648
110	309

50	648
112	507

50	648
124	356

50	648
129	540

50	648
141	51

BENJAMIN V. THE DISTRICT TOWNSHIP OF MALAKA ET AL.

1. **School District: TAXATION FOR SCHOOL-HOUSE.** Where, at a meeting of the electors of a district township, it was voted "that there be an appropriation sufficient to build a house on the line between sub-districts 1 and 8," and it was further voted "that there be eight hundred dollars levied as school-house tax," it was *held* that this amounted to voting a tax for the school-house described in the first motion.
2. ——— : ——— : **MANDAMUS.** The directors having refused to proceed to the erection of a school-house, *mandamus* was the proper remedy to compel them to do so.
3. ——— : ——— : **VESTED RIGHT.** The tax having been voted and collected the right of the people of the sub-district to the school-house became a vested one, and it was not then competent for the electors to rescind their former action.

Appeal from Jasper District Court.

FRIDAY, APRIL 25.

THE object of this action is to obtain a writ of *mandamus* compelling the defendant board of directors to select a site and erect thereon a school-house, in pursuance of a vote of the electors of the district township.

The District Court granted the relief asked, and the defendants appeal.

J. C. Cook, for appellants.

Smith & Wilson, for appellee.

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SÆEVERS, J.—I. At a meeting of the board of directors in September, 1875, it was determined “that the matter of furnishing a school-house to Mr. Benjamin and others be left to the spring meeting” and at such meeting of the electors in 1876, the following proceedings were had: “Motion made that we proceed to the regular order of business, viz.: taking under consideration the building of a school-house on the line between sub-districts 1 and 8. Carried. Motion made that there be an appropriation sufficient to build a house on the line between sub-districts 1 and 8. Carried. Motion made that there be eight hundred dollars levied as school-house tax. Carried.”

1. SCHOOL dis-
 trict: taxa-
 tion for school-
 house.

The house mentioned in these proceedings is the one plaintiff seeks to compel the board of directors to erect, they having refused to do so. The taxes voted as above stated were levied and collected.

It is provided by statute that the directors, when assembled, have the power “to vote such tax, not exceeding ten mills on the dollar, * * * as the meeting shall deem sufficient for the purchase of grounds and the construction of the necessary school houses.” Code, § 1717. And it is the duty of the board of directors “to carry out any vote of the district.” Code, § 1723.

It is insisted the electors did not determine to erect the particular house in question, and that the tax was not voted for that purpose. The testimony fails to show that any other house was contemplated or even thought of at the time.

It clearly appears that the electors determined to and did make an appropriation sufficient to build the house in question, and at the same time determined to raise “eight hundred dollars as a school-house tax.” This must, under the circumstances, be construed to be an appropriation to that extent for the house about which the electors were consulting.

Their action can have no other meaning. We think the electors determined to erect this house, made an appropria-

 Benjamin v. The District Township of Malaka.

tion sufficient for the purpose, and agreed to raise by taxation eight hundred dollars for such purpose, and no other.

II. It is urged that the remedy of the plaintiff was to appeal from the refusal of the board of directors to the county ^{2. _____;} superintendent, and that this action will not lie ^{mandamus.} because there was another plain, speedy, and adequate remedy. In support of this position, *Marshall v. Sloan et al.*, 35 Iowa, 445, is cited. That case is not in point, because under the statute governing that decision the thing to be done was, to some extent at least, discretionary. It was not the positive duty of the board to take the action desired by the plaintiff in that case. Here, as we have seen, there is a plain official duty to be performed. An appeal would not afford either a speedy or adequate remedy, for the school officers have no power to enforce their decisions, and therefore the plaintiff might be compelled to come into the courts at last. Where a positive official duty is enjoined by law upon any officer, and as to the mode or manner of performance he has no discretion, the only adequate remedy ordinarily is that of *mandamus*.

III. After the tax had been collected and this action commenced, the electors, at the annual meeting in 1878, rescinded their previous action in relation to the ^{3. _____;} erection and appropriation for the house in ques- ^{vest.d right.} tion. By the payment of the taxes levied and collected for the purpose of erecting the house, the plaintiff's right thereto became vested, and no subsequent action of the electors, without his consent, could have the effect of depriving him of such right. The cases cited by the appellants are not applicable.

AFFIRMED.

Carmichael v. Vandebur and Hopkins.

50	651
78	535

CARMICHAEL V. VANDEBUR AND HOPKINS.

1. **Practice: JUDGMENT: REVERSAL.** A judgment will not be reversed for an error of the court below, unless the question involved has in some way been presented to the court, and a ruling had thereon.
2. **Evidence: IDENTIFICATION OF PARTY.** It is competent to identify a party to the record of a former action and decree therein by parol evidence.
3. **Vendor and Vendee: FRAUDULENT REPRESENTATIONS.** Where an agent of the vendor, whose title was that of holder of a certificate of purchase at sheriff's sale, took the vendee upon the land proposed to be sold, and as an inducement to the sale pointed out certain improvements which were known by the vendor not to be covered by the certificate, and with such knowledge assigned the certificate, he cannot urge that the vendee should have made inquiry with respect to such improvements.

Appeal from Lucas District Court.

FRIDAY, APRIL 25.

THIS is an action to recover damages for the alleged fraudulent representations of defendants, by which plaintiff was induced to purchase of defendants certain real estate.

It is averred in substance, in the petition, that defendants represented that said real estate had been sold to them at sheriff's sale; that the time for redemption would expire in about fifteen days, when, if there should be no redemption, the sheriff would make a deed which would convey a perfect title, excepting that the holder of the sheriff's deed would have to redeem from a mortgage lien of one thousand two hundred and thirty-six dollars; that defendants' agent, one A. White, took the agent of plaintiff upon said land and pointed out the same, and particularly a dwelling-house, improvements and trees, and the surroundings, and the said agent, relying upon the representations made by said defendants and their agent, who particularly pointed out the premises, and believing she was purchasing the said dwelling-

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house, trees, improvements, etc., as a part of the farm, she purchased the same of defendants and paid them therefor, redeeming the same from said prior mortgage, and took possession of said farm about November 13, 1876; that afterward Emma Webb, the wife of Martin Webb, brought an action against plaintiff, and obtained a decree for about two acres of said land, including the dwelling-house, trees and improvements aforesaid, the same being the homestead of said Martin Webb and Emma Webb, and that plaintiff has surrendered the possession of that part of said real estate to said Emma Webb.

It is averred that plaintiff has sustained damages, by reason of said false representations, in the sum of eight hundred dollars, for which she asks judgment.

The answer of defendants denies that they represented that the certificate of sale included the improvements situated on said farm, and denies that the certificate of sale did include said improvements. Denies that A. White was the agent of defendants for the sale of said land. The answer further avers that one Samuel Carmichael, who is the husband of the plaintiff, proposed to buy a certificate of purchase of said land which defendants held jointly, and defendants repeatedly informed said Carmichael that said certificate would not hold the homestead, and forty acres of land of said farm, including the improvements, but that they would assign all their right, title and interest therein for one hundred and thirty dollars, and advised said Carmichael to examine the records and ascertain from an abstract office the true condition of the title, and that defendants had been informed that Martin Webb, the former owner of said land, had procured a loan by mortgaging said land, and that said mortgage covered the house and homestead, and if this was true said Carmichael could purchase the mortgage and defendants' certificate, and thereby procure a title to the farm.

It is further averred that said Carmichael did consult attor-

Carmichael v. Vandebur and Hopkins.

neys and abstractors, and satisfied himself, and purchased defendants' certificate with the full understanding that the same would not secure the said homestead, nor any title thereto.

There was a trial by jury. A verdict was returned for the plaintiff for five hundred dollars, upon which judgment was rendered. Defendants appeal.

Thorpe & Sons and J. D. Hull, for appellants.

Stuart Bros. & Bartholomew, for appellee.

ROTHROCK, J.—I. It appears from the record that the verdict was returned on the 12th day of November, 1877. On the 14th day of the same month a motion for a judgment: reversal. new trial was filed, submitted and taken under advisement, and the cause continued until the next term. On the 25th day of December, and in vacation, the motion for a new trial was overruled, and on January 11, 1878, in vacation, a judgment was entered upon the verdict of the jury. The appeal was taken in April, 1878.

It is now assigned as error that the court erred in overruling the motion for a new trial, and in rendering judgment in vacation. It is sufficient to say, upon this assignment of error, that the entry of a judgment in vacation was irregular. We are not prepared to say that it is void. Under certain circumstances it may be so entered. Code, § 183. But a more conclusive answer to the argument of counsel for appellant is that the rule is inflexible that a judgment cannot be reversed for an error of the court below unless the question involved has been in some way presented to the court, and a ruling had thereon. For aught that appears here, if this had been done the claim of appellee's counsel that the record should have shown an agreement of the parties for judgment in vacation would have been established.

II. The plaintiff introduced the record of the circuit

 Carmichael v. Vandebur and Hopkins.

court showing that an action was brought by Martin Webb
 2. EVIDENCE: against Sarah J. Carmichael for the land em-
 identification
 of party. braced in the homestead. The decree of evic-
 tion was also against Sarah J. Carmichael. The plaintiff's
 name is Martha Carmichael. The defendants objected to
 this evidence, whereupon the court permitted the plaintiff,
 against the defendants' objection, to show by parol that
 the plaintiff was served with an original notice in that ac-
 tion, in the name of Sarah J. Carmichael; that she ap-
 peared thereto, and that the decree was taken against her
 by the name of Sarah J. Carmichael. This ruling of the
 court is assigned as error. That the plaintiff is estopped
 from ever questioning that decree, because there was a mis-
 take in her name in the proceedings, admits of no question.
 After her appearance under the mistaken name, without
 objection, she is bound by the decree, no matter what her
 real name is. The parol evidence was properly admitted.
 It consisted of nothing but the mere identification of one of
 the parties to the decree. It is always allowable to identify
 the parties to any writing by parol evidence.

III. No objection was made to the instructions of the court
 to the jury. It is insisted, however, that the verdict is against
 the instructions, and is not supported by the evi-
 3. VENDOR and
 vendee: fraud-
 ulent repre-
 sentations. dence. We need not set out either the instruc-
 tions or the evidence. As to the former we may
 say they are in substance those usually given in cases of this
 character. As to the evidence, we think it sufficiently sup-
 ports the verdict to preclude our interference. That White
 was the agent of the defendants, employed to sell the farm,
 we think is fully established; that he took Carmichael on the
 farm and showed him the dwelling-house, trees and other
 improvements is not denied. The land with the improve-
 ments, from which the plaintiff was afterward evicted, was
 not detached from the other real estate. Webb, the former
 owner, had absconded, and there was nothing in the appear-

Carmichael v. Vandebur and Hopkins.

ance of the property to indicate that any one had any homestead right in any part of it.

The acts of White in pointing out and examining with Carmichael the improvements in question were equivalent to a positive declaration that it was proposed to sell the whole of the land. Carmichael testifies that at no time did the defendants state that the certificate did not cover the whole of the real estate which was shown to him. Upon the other hand both of the defendants and their agent, White, testify that defendants stated to Carmichael that the certificate of sale did not cover the homestead.

It is true the defendants have more witnesses upon this question than the plaintiff has, but it is not our province to determine their credibility. We cannot take the place nor usurp the functions of the jury.

It is claimed that the plaintiff should have ascertained whether the certificate of sale included the homestead, and that he made no effort in that direction. It is very questionable whether any reasonable diligence to ascertain this fact would have been available. We are unable, from an examination to determine whether the description in the certificate includes the homestead, and the court instructed the jury that it was a question of fact for them to determine. This, however, as it appears to us, is not a material question. If the jury found that the defendants' agent, White, took Carmichael upon the land, and as an inducement to him to purchase pointed out these improvements, and that defendants, with knowledge of that fact, assigned the certificate knowing, as they claim they did, that it did not cover the homestead and improvements, they are in no position to urge that Carmichael should have made further inquiry.

AFFIRMED.

50	656
79	149
50	656
93	518
50	656
101	671
50	656
110	264
50	656
124	122

KLINE V. THE K. C., ST. J. & C. B. R. Co.

1. **Practice: WAIVER OF ERROR: MOTION FOR MORE SPECIFIC STATEMENT.**
The right to object to the action of the court in overruling a motion for more specific statement is waived by answering over.
2. **Evidence: RAILROADS: PERSONAL INJURIES.** It was competent, in an action against a railroad company for damages for personal injuries, to show the compensation the plaintiff was receiving at the time the injury occurred.
3. ———: **EXPERTS.** An inquiry with respect to the ability of the plaintiff, after the injury, to perform certain services, involved no question of skill, science or trade, and was not competent to be addressed to a witness testifying as an expert.
4. **Instructions: LIMIT OF: TRIAL.** It is impracticable for the court, in the trial of jury cases, to instruct in detail upon all the facts involved in the evidence.
5. **New Trial: IMPEACHING EVIDENCE.** A new trial will not be granted on the ground of newly discovered evidence, when such evidence is merely impeaching in its character.

Appeal from Pottawattamie District Court.

FRIDAY, APRIL 25.

THE plaintiff was in the employment of defendant as yard-master at Council Bluffs. Part of the duty devolving upon him by reason of such employment consisted in the making up of freight and passenger trains, and in the coupling of cars in making up said trains. On the 29th day of March, 1877, he was injured, as he alleges, by reason of the negligence of the defendant and its employes, without any contributory negligence on his part. The injury consisted in the plaintiff's left hand being crushed between the draw-heads of the cars he was attempting to couple.

It is averred—*First*, that the defendant carelessly and negligently received from one of the connecting lines of railway at Council Bluffs a certain freight car, to be forwarded on defendant's road, the drawhead of which was so out of

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repair as greatly to imperil the safety of any one who should be called upon to couple the same to other cars, in ignorance of its condition, and this caused the injury to plaintiff complained of; and, *second*, that the engineer in charge of the engine engaged in making up said train carelessly and negligently failed to observe and obey the signals given him by plaintiff in reference to the movements of the train, and that thereby plaintiff received his injury.

The answer was a general denial of the allegations of the petition. There was a trial by jury, and a verdict and judgment for the plaintiff of one thousand four hundred and twenty-five dollars. Defendant appeals.

Sapp, Lyman & Ament, for appellant.

Clinton, Hart & Brewer, for appellee.

ROTHROCK, J.—The defendant, before answering, filed a motion asking that the plaintiff be required to make the petition more specific by stating from what railroad, and when, the car which is alleged to have caused the injury to the plaintiff was received, and to state in what way the drawhead of said car was out of repair. The court overruled the motion. We need not determine whether there was error in overruling this motion. The defendant waived the error, if any there was, by answering over. *Coakley v. McCarty*, 34 Iowa, 105, and cases cited.

II. A number of errors are assigned upon the rulings of the court upon the admission and rejection of evidence, which we will now proceed to consider. The following question was propounded to the plaintiff in his examination in chief: "State what wages you were receiving from the company at the time of the accident."

An objection to this question was overruled. We think there was no error in this ruling.

By the accident the plaintiff had the first and second fin-

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gers on his left hand permanently injured, and it was competent, on the question as to the amount of his damages, to show what his services were worth before he was injured, and how much less he was able to earn afterward by reason of the injury. It is fair to presume that the compensation he was receiving was the reasonable value of his services.

The plaintiff was asked this question:

"State whether you are able, with your hand in its present condition, to do the same kind of work that you had previously been accustomed to? Could you brake or could you couple cars?"

An objection to this question was overruled. It is urged that the question called for the opinion of the witness as to the extent and permanency of the injury. It seems to us that an answer to the question did not involve an opinion. It was a fact purely as to whether plaintiff could do the specified work in his present condition.

It is claimed the injury was caused by the engineer disregarding a signal given him by the plaintiff to stop the train. One Bacon, a witness for the plaintiff, testified that such signal was given, and that while he did not see the engineer reverse his engine he knew he did reverse it because he heard the noise of taking up the slack. He further stated that he knew by the cars coming together, the drawheads bumping together along the train, that the engineer was again backing the train. At this point the witness was asked this question:

"Could that have been done in any other manner than by putting on steam?" The answer was: "No, sir; it could not have been done in any other manner than by reversing his engine, because if he had left the engine the way it was it would have stopped and held them there."

This question was objected to as incompetent and leading. That it was leading must be admitted, and we have very great doubts as to its competency. But we fail to see how the defendant was prejudiced thereby. It seems to us that the question and answer were merely the verification of a self-

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evident proposition. The witness stated that he knew the engine was reversed, and the cars sent back, by the cars coming together, and the drawheads bumping along the train. Before that the slack had been taken up in obedience to the signal to stop. Now it was unnecessary to prove, if the slack was taken up and afterward the cars came together, that it must have been done by putting on steam, unless there was something in the grade of the track which was material in determining the question. Of course the cars, under these circumstances, could not be bumped together without so changing the engine as to produce that result.

The defendant, in the cross-examination of the witness Bacon, propounded certain questions to him as to the custom or rule among brakemen in making couplings. Objections to these interrogations were interposed upon the ground, among others, that they were not cross-examination. The objections were sustained. We think the ruling of the court was correct. This was a subject not embraced in the examination in chief, and it was in no sense legitimate cross-examination.

Dr. D. McCrae attended the plaintiff professionally for the injury. He was called as a witness, and after stating that
3. —: ex. the injury to the plaintiff's fingers was very
perts. severe, that they were badly mashed, and that the middle finger was quite stiff and the forefinger permanently stiff, the following questions were propounded to him:

"I will ask you to state to what extent the injury impairs the usefulness of that hand for any skilled occupation, or any occupation requiring a quick and ready use of the hand?"

Answer. "It just simply involves the loss of those two fingers to a certain extent. As I said before, it may improve in the course of time, but to what extent I cannot exactly tell; but certainly they will never be as well as they were before. The forefinger is the principal finger used."

"State the degree to which the usefulness of that hand would be impaired for skilled labor, requiring quick and ready

use of the fingers, such as coupling and braking cars on the railroad?"

Answer. "I cannot conceive that anything would be more in the way than a stiff finger in coupling cars or jumping up on cars when it would be necessary to reach up. That short finger would always be in the way, or a finger that would not act as quick as it used to."

The questions were objected to and the objections were overruled. We think the objections should have been sustained. The inquiries involved no question of skill, science or trade which authorizes expert testimony (*Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31; *Muldowney v. The Ill. Cent. R. Co.*, Id., 462); but we are inclined to think that the evidence elicited by these interrogations was not prejudicial to the defendant.

The plaintiff's stiffened fingers were exhibited to the jury, and the medical witness properly gave his opinion as to the nature and extent of the injury. That the plaintiff could not use his fingers as he did before the injury was a self-evident fact. The opinion of a thousand witnesses that he could not use his fingers as before would not add to the proof. How any party could be prejudiced by a witness gravely giving his opinion that the forefinger of the hand is the one principally used, and that stiff fingers would interfere with any work requiring their use, is more than we can comprehend. We must presume that jurors are men of ordinary comprehension, and that, without the opinion of this witness, the fact that plaintiff could not use his fingers as he did before the injury was established beyond all question.

There is one other alleged error as to the improper admission of evidence. We need not consider it. It belongs to the same class of testimony as that above discussed.

III. There was no evidence that the drawhead of the car received from the connecting road was out of repair. It was not exactly of the same height as the one on the car which plaintiff attempted to couple to it. The court in-

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structed the jury that evidence that the drawheads were not of uniform height would not sustain the allegation of the petition that the drawhead was out of repair, and the plaintiff could not recover on that allegation. The defendant asked certain instructions as to the rights and duties of the parties where the drawheads were not of uniform height. These instructions were refused. This ruling of the court was correct. The allegation as to the defective drawhead was practically out of the case, and it would have been manifestly improper, as tending to confuse the jury, for the court to have instructed them upon questions not before them for their consideration.

IV. Other instructions were asked by the defendant which the court refused. They are directions to the jury "to consider whether it was an act of ordinary prudence in the plaintiff, after he had signalled the train to stop, to go between the cars to attempt to make the coupling before the train had stopped, and that before the defendant can be held liable for any negligence on the part of the engineer it must appear from the evidence that such negligence was the direct cause of the injury."

4. INSTRUCTIONS: limit of: trial.

These instructions are not objectionable on the ground that they contain erroneous propositions of law. But we think the instructions given by the court sufficiently elaborate the proper rules as to the alleged negligence of the engineer and contributory negligence of the plaintiff.

It is almost impossible for a trial judge, when he is required to reduce to writing all the instructions given to the jury, to call their attention to every fact in the case proper for their consideration. If he should undertake to instruct upon the facts in detail for one party, he must, in fairness, do the same thing for the other. To do this would not be practicable in the trial of the jury cases.

V. It is urged that the verdict is not supported by the evidence. Two witnesses, the plaintiff and Bacon, testify positively that the plaintiff signalled the engineer to stop the

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train, and that the speed of the train was slackened. On the other hand, the engineer testifies that he was on the look-out for signals, but that none were given. It is argued that the plaintiff was in such position that the engineer could not have seen the signal if any was made. We do not regard this as sufficient to justify our interference with the verdict. We cannot determine whether a signal was given, or whether it was observed, or could have been seen by the engineer. This question has been settled by the jury, as we think, without passion or prejudice, upon the evidence before them. The same may be said of the alleged contributory negligence of the plaintiff.

VI. The verdict is also claimed to be against the evidence because it is excessive. The amount of the recovery was one thousand four hundred and twenty-five dollars. The injury was severe and very painful. The surgeon who attended the plaintiff testified as follows:

"Such a wound is extremely painful—about the most painful a man can have."

That the injury is permanent is beyond question. Under these circumstances we think the verdict was not excessive.

VII. Lastly, it is urged that a new trial should have been granted on the ground of newly discovered evidence, mis-
5. NEW trial: impeaching evidence. conduct of the plaintiff, and surprise. The defendant filed certain affidavits tending to show that the witness, William Bacon, had, before he was called as a witness, expressed himself as remembering the occurrence, at the time of plaintiff's injuries, substantially as detailed by the engineer. Other affidavits tend to show that the day before the case was tried Bacon was arrested for disorderly conduct, and was taken before a magistrate and fined, and that plaintiff paid a part of the fine and costs. The plaintiff filed his own affidavit, and the affidavit of Bacon in resistance of the motion.

It is, perhaps, enough to say, in support of the ruling of the court below, that the newly discovered evidence is in its

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nature impeaching, and, for aught that appears in the record, the defendant was fully prepared to show Bacon's alleged contradictory statements before the introduction of the evidence upon the trial was closed.

As to the alleged improper conduct of the plaintiff, we think it is sufficiently explained in the counter-affidavits.

AFFIRMED.

COCHRAN V. THE IND. SCHOOL DIST. OF COUNCIL BLUFFS.

1. **School District : CONDEMNATION OF LAND : NOTICE.** The holder of a certificate of tax sale is entitled to notice of proceedings to condemn the land embraced in his certificate for a school-house site, and he cannot be deprived of his interest without compensation therefor.
2. ——— : ——— : ———. A notice by publication, to the holder of the legal title, and "all other persons interested," was *held* not sufficient to charge the holder of the tax-sale certificate with notice.

Appeal from Pottawattamie District Court.

FRIDAY, APRIL 25.

THE plaintiff brings this action to quiet his title to a certain lot in Council Bluffs. The defendant, for answer, alleges that the land was, under proper proceedings on the part of the defendant, condemned for school-house purposes, as provided by law, and asks that plaintiff's petition be dismissed.

The cause was submitted to the court on an agreed statement of facts, as follows :

"1. That plaintiff, on November 7, 1871, purchased the real estate in controversy at tax sale, and at time of the condemnation held only a certificate of tax purchase.

"2. That on the 11th day of January, 1877, the county treasurer executed to plaintiff a tax deed on his certificate of purchase.

"3. That prior to 1871, and all times subsequent thereto,

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plaintiff has been a resident and a citizen of Pottawattamie county, Iowa, and that he at no time had personal or actual service, or read or saw said notice published in any way, of the said condemnation, until after he had procured his said tax deed for said premises, under said certificate of tax purchase; that he never had possession of said premises.

"4. That never at any time has he received his redemption money, or been tendered the same from defendant, nor was any portion of the condemnation money set out or appropriated or paid to plaintiff, or tendered to him by defendant, and that the same has never been paid or tendered to him by any one, and that he now claims the title to said premises by virtue of his said tax deed derived from said tax purchase, a copy of which is annexed to his petition.

"5. That the proceedings contained in exhibit 'A,' hereto annexed, were instituted by defendant; that no other notice was ever served than the one—exhibit 'B,' hereto annexed—for the condemnation of said property.

That the condemnation money, three hundred and sixteen dollars and sixty-six cents, was paid into the county treasurer's office as provided by law, of which plaintiff had no notice or knowledge, and the said sum of money was paid to Sophia Graham, or to the legal representatives of John Knoppels, deceased; that at the time of said condemnation proceedings the record title was in John Knoppels, and the defendant had no actual knowledge of plaintiff's claim under his tax certificate. But defendant admits that the treasurer, after the said premises were sold, on the 7th day of November, 1871, properly entered the same on the tax-sale books of Pottawattamie county, and properly entered the same on the auditor's books, as provided by statute in relation to the sale of real estate for taxes; that defendant took possession of said real estate under said condemnation proceedings, and now has such possession, and has no other title than derived from the said condemnation proceedings, and that the same are now used for school purposes by virtue thereof."

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Exhibit "A," referred to in the foregoing statement of facts, is a record of condemnation of the lot in question for school-house purposes, under sections 1825-1828 of the Code. The condemnation proceedings were consummated on the 18th day of January, 1872. Exhibit "B" is a copy of the notice pursuant to which the condemnation proceedings were instituted. This notice is to "Sophia Graham, late Sophia Knoppels, and the unknown heirs of John Knoppels, deceased, late of Council Bluffs, Iowa, and to all other parties interested," and was published for four consecutive weeks in the Council Bluffs *Weekly Nonpareil*.

Upon the foregoing statement of facts the court rendered a decree in favor of plaintiff, as prayed in his petition. The defendant appeals.

Scott & Hight, for appellant.

Geo. A. Holmes, for appellee.

DAY, J.—I. The plaintiff purchased the property at tax sale, and received a certificate of purchase before the condemnation proceedings were instituted. By this purchase he acquired a right to have the purchase money, with penalty and interest, refunded to him within three years, or, if this was not done, to have a deed executed to him conveying an absolute title to the property. This right is a valuable one, and plaintiff could not constitutionally be deprived of it without compensation, or, at least, without notice of the condemnation proceedings, which would enable him to assert and protect his rights.

Appellant insists that the statute (sections 1825-1828 of the Code) provides for proceedings against and notice to the owner only; that plaintiff was not the owner at the time these proceedings were instituted, and that, therefore, his rights were taken away without compensation and without notice.

In *Severin v. Cole and The B., C. R. & M. R. Co.*, 38 Iowa,

Atkins v. Paige.

463, a case not cited by counsel, it was held that, in a proceeding to condemn right of way for railroad, a mortgagee was an owner under the statute, and entitled to compensation. In this case it is said: "The railroad company cannot obtain, by proceedings under *ad quod damnum*, greater rights than it could acquire as an innocent purchaser for value from the owner to whom notice is given." That case, in principle, seems to be decisive of this.

II. It is claimed, however, that a notice was published, directed to the widow and unknown heirs of John Knoppels, 2. —: —: deceased, and to all other persons interested, and —. —. that plaintiff was thus notified of the proceedings to condemn. Section 1827 of the Code provides that the county superintendent shall give to the owner of the real estate to be condemned "the same notice as is required for the commencement of a suit at law in the District Court." The agreed statement of facts shows that the plaintiff, at the time the condemnation proceedings were instituted, was a resident of Pottawattamie county. He could not, therefore, under the statute, be properly notified of the proceeding by publication.

AFFIRMED.

ATKINS V. PAIGE.

1. **Tax Sale : REDEMPTION FROM : STATUTE OF LIMITATIONS.** An action to foreclose a right of redemption from tax sale was not barred, under the Code of 1851, until after ten years and six months from the time the purchaser became entitled to his deed, the statute not commencing to run until after six months from the time of completed sale.

Appeal from Polk Circuit Court.

FRIDAY, APRIL 25.

ACTION to foreclose a right of redemption from a tax sale.
The property is in the city of Des Moines, and was sold under

Atkins v. Paige.

a city ordinance December 21, 1863, for the taxes for years 1857, 1862 and the years included. This action was commenced February 17, 1877. The defendant derived title through a sale made upon the foreclosure of a mortgage subsequent to the tax sale. He claims that the action is barred by limitation of time, and also that the tax claim was cut off by the foreclosure. There was a decree for the plaintiff. The defendant appeals.

M. D. McHenry, for appellant.

Barcroft, Given & Drabelle, for appellee.

ADAMS, J.—The defendant claims that at the time of the sale there was in force a city ordinance by which the right to bring an action to foreclose the right of redemption from a tax sale was limited to five years from the time of sale, but the ordinance relied upon relates to an action for the recovery of real property, and not to an action for foreclosure.

1. TAX sale: redemption from: statute of limitations.

The defendant, however, claims that if the action is not barred by ordinance it is by the statutory period of ten years. The action was not brought within ten years from the time the deed was due, but was brought within ten years and six months from that time. The appellee claims that an action for foreclosure could not have been brought before the expiration of six months from the time the deed was executed, and that the statute did not commence to run until the expiration of six months from the time when it might have been executed. In this we think that the appellee is correct. Chapter 105 of the Acts of the Seventh General Assembly provided that the mode of making sales for city taxes effective, and foreclosing the right of redemption, should be the same as provided by the Code in case of sales by the county treasurer. The Code (section 506, Code of 1851) provided for action for foreclosure at any time after six months from day of sale. But, by ordinance, no deed could be made until

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three years from the day of sale. Until it was made there was certainly no right of foreclosure, and until it was due the sale could not be regarded as completed. *Eldridge v. Kuehl*, 27 Iowa, 160; *Hintrager v. Hennessy*, 46 Iowa, 600. Under the provision of the Code referred to the statute would not, we think, begin to run until six months from the time of completed sale, or, in other words, until six months from the time a deed was due.

But the appellant claims, as an independent ground of defense, that the tax claim was cut off by the foreclosure of the mortgage. One Allen was the purchaser at the tax sale, and he was made defendant in the action for foreclosure. This fact constitutes the basis of the appellant's claim; but we see no evidence that Allen was the holder of the tax claim at the time of the foreclosure.

AFFIRMED.

STEWART V. THE CITY OF COUNCIL BLUFFS.

1. **Municipal Corporation: POWERS OF CITY: DAMAGES.** A city has the right, through its council, to authorize the purchase of a right of way for a ditch, and will be bound to reimburse the party authorized to procure it; but it cannot enter into an agreement with such party that it will construct the ditch, nor can he recover damages for any alleged injuries he may have suffered by a subsequent determination of the council not to proceed with the work.

Appeal from Pottawattamie Circuit Court.

FRIDAY, APRIL 25.

THE plaintiff shows in his petition that he is the owner of certain real estate, including buildings and machinery in the city of Council Bluffs, used by him in the business of pork-packing; that in 1876 the city determined to change the course of a certain creek flowing through the city by the construction of a ditch; that the construction of the ditch was

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desirable for the city as a protection to its health and for its safety, and desirable for the plaintiff as facilitating his business as a pork-packer, and enabling him to do summer packing; that the common council let the contract for the construction of the ditch; that it was necessary, however, to procure a right of way through certain grounds belonging to the Chicago, Rock Island & Pacific Railroad Company; that the city, for want of funds, was unable to procure such right of way; that the plaintiff, being apprehensive that the construction of the ditch would be suspended or abandoned, proposed to procure the right of way at his own expense if the city would issue a warrant for his reimbursement, and complete the improvement; that thereupon it was resolved by the common council that, in case the plaintiff should procure for the city a right of way, the city recorder should be instructed to draw and deliver to him the warrant as demanded, and that the street commissioner should notify the contractor to proceed to complete the ditch; that the plaintiff, upon the strength of the resolution, obtained a deed of the right of way for the city at his own expense, and tendered it to the city and demanded the warrant; that the city refused to accept the deed and refused to issue the warrant, and passed a resolution abandoning the improvement.

The plaintiff also shows in his petition that prior to the time of the tender and refusal of the deed he enlarged and improved his buildings at an expense of two thousand five hundred dollars, for the purpose of doing summer packing; that without the ditch he was unable to do summer packing; that the money expended in enlarging and improving his buildings was lost to him; that he contracted for a large number of hogs for summer packing, but was unable to take them, and that by reason of his failure to take them he sustained great loss, to wit: in the sum of ten thousand dollars.

The plaintiff, in the first count of his petition, claims the value of the warrant; and in the second and third counts the other damages above set forth. The defendant demurred to

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the petition. The court overruled it as to the first count, and sustained it as to the second and third. The plaintiff appeals.

Sapp, Lyman & Ament, for appellant.

G. A. Holmes, for appellee.

ADAMS, J.—The city doubtless had the power to make the improvement if necessary for the health or safety of the city, and if so it had the power to incur such reasonable expense as might be necessary to obtain a right of way. We see no objection to the city's agreeing to issue a warrant to the plaintiff to reimburse him for his expenditure or service in procuring a right of way, and that is as far, we think, as the city had the power to go. It appears to us indeed to be doubtful whether the city intended to obligate itself to the plaintiff to complete the improvement, and in case it did whether there was any consideration for entering into such obligation. But, conceding all that the plaintiff claims in this respect, we think that there was a lack of power to enter into such obligation. Whether a city should make a given improvement or not often calls for the exercise of a wise discretion, and we do not think that the city government can be allowed to divest itself of such discretion. It should, we think, be at liberty at all times to correct its mistakes, if it makes any, and especially to change its action or determination when required by a change of circumstances.

The making of an improvement may seem to be expedient at one time and inexpedient later. The price of labor and materials may advance. Unforeseen difficulties may arise in the character of the work. Some shift may be discovered that will answer at least a temporary purpose. The city treasury may be depleted by fire, robbery, defalcation, or some extraordinary and unforeseen expenditure. Of course, if a work is let by contract and abandoned, the contractor

Ohm v. Dickerman.

must be allowed to recover his damages. This results from the nature of the case. The power to let work to be done by contract is a necessary power, and, whenever a city exercises it, it exposes itself to the liabilities necessarily incident to the exercise of such power. But there is no necessity for a city to obligate itself to a citizen to make an improvement. The necessity of obtaining a right of way does not create a necessity to enter into such obligation. If a city needs a right of way for an improvement it should obtain it, as it obtains other things which it needs, by paying its money value, and not by contracting to do something whereby it shall become subjected to an indefinite liability for failure. The power contended for is not only unnecessary, but its exercise might be disastrous to a city, especially if the rule of damages contended for were to be sanctioned. There is no pretense that the power is expressly granted. Being of the opinion that it is not implied we have to say that we think that the demurrer was rightly sustained.

AFFIRMED.

Mr. Justice SEEVERS, while concurring in the result, does so upon the ground that he thinks that the city did not attempt to enter into the alleged contract, and expresses no opinion as to whether it had the power to do so.

50	671
79	14

OHM V. DICKERMAN.

1. **Usury: CONFESSION OF JUDGMENT.** A confession of judgment, in consideration of the extension of a note, made to evade the law against usury, will be regarded as invalid.

Appeal from Winneshiek Circuit Court.

FRIDAY, APRIL 25.

ACTION in equity to set aside a confession of judgment. The plaintiff avers that it was obtained by fraud, and given

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for a consideration that was wholly usurious, and also avers payment. The plaintiff was indebted to the defendant upon a promissory note for one thousand dollars, bearing ten per cent interest. At the time the note became due the plaintiff applied for and obtained an extension for one year under an agreement that the plaintiff should pay fourteen per cent interest for such extension. For such interest he paid twenty dollars down, and confessed judgment for one hundred and twenty dollars, which is the confession of judgment in question. The plaintiff avers that he has paid the note of one thousand dollars, and the agreed fourteen per cent interest for the extension, and claims that the confession of judgment should be cancelled, not only because it was fraudulently obtained, but because the full amount according to his agreement has been paid.

The defendant denies that the plaintiff has paid any part of the fourteen per cent interest except the twenty dollars, and claims that the amount embraced in the judgment is still due. There was a judgment for defendant. Plaintiff appeals.

L. Bullis, for appellant.

Brown & Wellington, for appellee.

ADAMS, J.—The case is not triable *de novo*, and the defendant claims that there is a conflict of evidence on all the material points, and that the judgment must, therefore, be affirmed. Upon the issue of fraud there is a conflict of evidence, but not, we think, on the issue of payment. The balance of the fourteen per cent interest represented in the confession of judgment became due February 1, 1872. The plaintiff testifies positively to the payment of it, and in this he is somewhat corroborated by another witness, who testifies to seeing the plaintiff pay the defendant one hundred and twenty dollars on the 1st of February, but the testimony is deficient in not giving the year. The testimony of the defendant was not taken, nor is the

1. USURY: Confession of judgment.

 Peterson v. The Whitebreast Coal and Mining Co.

testimony of the plaintiff and his corroborating witness contradicted in any way, so far as we have been able to discover. The amount paid when the note was taken up was one thousand and seventeen dollars and fifty cents.

The appellee argues from this that the one hundred and twenty dollars could not have been paid, but the note was not taken up until the 4th of April, 1872. It is evident that the interest then paid was the interest which accrued after the extension expired. The one hundred and twenty dollars in question was, we think, paid the 1st of February of that year, and when the same became due. It follows that the judgment has been paid, with the exception of the interest which it bore; but that interest is, we think, not collectible. It is true it is a part of the judgment, but the judgment is invalid, we think, to that extent, and even more. It was confessed at the time the extension was given, and without any apparent reason for it, except to evade the law against usury, and we are satisfied that such was the design. It must, therefore, be regarded as invalid, so far as it was made to cover interest in excess of that which was legal. *Mullen v. Russell*, 46 Iowa, 386. All legal interest having been paid, the judgment should be cancelled.

REVERSED.

 PETERSON V. THE WHITEBREAST COAL & MINING COMPANY.

1. **Damages:** RESPONDEAT SUPERIOR. The principal is not liable for damages sustained by an employe from the negligence of a co-employe in the same general service, notwithstanding such co-employe is higher in authority than the one receiving the injury.

Appeal from Lucas Circuit Court.

FRIDAY, APRIL 25.

THE petition states that defendant is a corporation engaged in mining coal, and that one Haven is president and superin-

50	673
92	342
50	673
98	60
50	673
100	207
100	448
50	673
116	621

Peterson v. The Whitebreast Coal and Mining Co.

tendent thereof; that plaintiff was an employe of the company, and while in its service he was greatly injured, without fault on his part, but through the fault and negligence of one "Watson, a boss or foreman of defendant, having charge and control of the plaintiff and John Peterson." To this petition there was a demurrer, which being sustained, the plaintiff appeals.

J. N. McClanahan, for appellant.

Stuart Bros. & Bartholomew, for appellee.

SEEVERS, J.—It is conceded there is no statute making the defendant liable, but the claim is that a recovery can be had
1. DAMAGES: at common law. Nearly twenty years ago it was
respondent superior. held in *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421, that the principal was not liable for damages sustained by an employe from the negligence of a co-employe in the same general service. This rule as to railway corporations has been changed by statute.

It is insisted, however, that the case above cited is not conclusive as an authority in this, because Watson was boss or foreman having charge and control of the plaintiff and another employe.

It is apparent, however, that Watson was simply an employe engaged in the same general service as the plaintiff. It is true, he had to a limited extent a control of other employes. It does not appear what was the extent of his authority, except such as can be inferred from the terms used in defining it. Certain it is that it is not averred he had authority to discharge other employes, or that the defendant was negligent in employing him.

We have, then, for determination the question whether the defendant is liable for the negligence of a co-employe of a different grade, but who is vested with no authority in the general management of the corporation. It makes no difference if the employe receiving the injury is inferior in grade

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to the one by whose negligence the injury was caused. Shearman & Redfield on Negligence, § 100. In support of this doctrine many authorities are cited. The same rule is stated in Law of Negligence, by Wharton, § 229, where, however, it is said the rule is otherwise when the employer leaves every thing in the hands of an employe, reserving no discretion to himself.

There is no averment in the petition which brings this case within the exception, and no such presumption can be indulged. We are satisfied that the decided weight of authority is in favor of the ruling below.

It is insisted that *Harper v. Ind. & St. L. R. Co.*, 47 Mo., 567; *Lalor v. C., B. & Q. R. Co.*, 52 Ill., 401; *Fleke v. Boston & Albany R. Co.*, 53 N. Y., 549; and *Malone v. Hathway*, 64 N. Y., 5, sustain the position of appellant. Even if this were so, and we were to follow such decisions, the effect would be to overrule *Sullivan v. M. & M. R. R. Co.*, before cited, and this, in view of the legislation on this subject, we should feel unwilling to do. But counsel are mistaken as to the rule established in the foregoing decisions. The facts in the two last cases show them to be fairly within the exception above stated. In the other two cases the corporation was held liable, but upon an entirely different principle. Counsel also cite *Kellogg v. Payne*, 21 Iowa, 575; and *Callahan v. B. & M. R. R. Co.*, 23 Iowa, 563. Neither of these cases are applicable to the case in hand.

AFFIRMED.

 Royce v. Jenney.

50	676
80	475

50	676
114	610

ROYCE V. JENNEY ET AL.

1. **Taxation: EQUALIZATION: POWER OF SUPERVISORS.** The board of supervisors, as a board of equalization, has no authority to add property not assessed to the assessment roll or tax list, or to strike property therefrom duly assessed, its duties being limited to equalizing the value of property assessed by the proper officer.
2. ——— : ——— : **CERTIORARI.** Where the board has exercised powers not within its jurisdiction *certiorari* is the proper remedy for the tax payer aggrieved thereby.

Appeal from Black Hawk Circuit Court.

FRIDAY, APRIL 25.

CERTIORARI. The petition alleges that the board of supervisors of Black Hawk county, of which defendants are the members, illegally and in excess of its authority added to the assessment of moneys and credits of the city of Cedar Falls, for the year 1877, one hundred per centum, whereby plaintiff, who was assessed as a tax payer of said city by the assessor thereof, upon moneys and credits in the sum of seven hundred and fifty dollars, was charged upon the tax books of the county with taxes upon fifteen hundred dollars of moneys and credits. Upon findings of facts and law made by the court judgment was rendered for plaintiff. Defendants appeal.

J. B. Powers and Boies & Couch, for appellants.

J. J. Tolerton and J. L. Husted, for appellee.

BECK, CH. J.—I. The petition of plaintiff shows that he was legally assessed by the assessor of the city of Cedar Falls, for the year 1877, upon money and credits in the sum of seven hundred and fifty dollars; that such assessment was based upon a true statement of the property of plaintiff, and

 Royce v. Jenney.

was sworn to by him; and that the board of equalization of the city made no change in the same.

It is further alleged that the board of supervisors, acting as a board of equalization of the county, added to the assessment of the city of Cedar Falls, as returned by the assessor, one hundred per centum of the moneys and credits appearing thereon, thus doubling the taxation upon moneys and credits in the case of each tax payer; and that the board of supervisors, prior to the assessment of plaintiff, "failed to make a classification of moneys and credits among the descriptions of property to be assessed for the purpose of equalizing assessments of property."

The plaintiff charges that the act of the county board of equalization in changing the assessments is illegal and in excess of its authority.

The facts alleged in the petition, as above set out, were substantially found by the court to be established by the evidence, and thereupon judgment was rendered for plaintiff.

II. We are to inquire whether the county board of equalization has authority to change the assessment of money and credits lawfully made by the city or township assessor. The inquiry leads us to the consideration of the duties and powers of the several boards of equalization, township and county, as prescribed by law.

1. The township or city board of equalization is charged with the duty of equalizing the assessment of all tax payers in the township or city. This is done "by increasing or diminishing the valuation of any piece of property or the entire assessment of any tax payer, as may be deemed just and necessary for an equitable distribution of the burden of taxation upon all the property of the township." Code, § 829. It appears that this board may not only increase or diminish the valuation of property, but may in a like manner increase or diminish the "entire assessment of any tax payer." This may be done by adding property owned by the tax payer, not

1. TAXATION:
equalization:
powers of su-
pervisors.

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assessed, to the list, or by taking therefrom property assessed to him which he does not own. Code, §§ 830, 831.

2. The county board of equalization is charged with the duty of equalizing the assessment of the townships and cities, not of the tax payers. This is done by adding to or diminishing the *valuations* of property, so that the property assessed throughout the county may be uniformly valued. Code, §§ 832, 833. *Cassett v. Sherwood*, 42 Iowa, 623. It has no authority to add property not assessed to the assessment roll or tax list, or to strike property therefrom duly assessed. Its duties are none other than to equalize the value of property assessed by the proper officer. To secure this equal valuation the board of supervisors are required to classify taxable property for the direction of the assessors and township boards of equalization, and to aid the county board of equalization in the discharge of its duty. The action of the last-named board is upon classes of property, not upon the property of individuals, thus securing equality of value of all the property belonging to the same class.

In the case before us plaintiff was assessed upon seven hundred and fifty dollars of moneys and credits. This assessment indicated the number of dollars of money and credit upon which he was assessed, thus describing the quantity of the property called moneys and credits which he was found to possess subject to taxation. The language of the assessment is to be understood to mean the same as if it were used as applicable to other property. If plaintiff had been assessed upon seven hundred and fifty sheep and lambs, we would understand that the number used indicated the number of animals owned by him. So the seven hundred and fifty applied in this case to money and credits, indicates as a description the quantity of money and credits taxed. The fact that seven hundred and fifty dollars of money and credits are valued at seven hundred and fifty dollars, does not change the meaning of the language of the assessment.

The county board of equalization did not increase the

Royce v. Jenney.

valuation of the property assessed as money and credits, but increased upon the tax list the quantity of the property assessed. This the board had no authority to do. It cannot be claimed that an assessment upon seven hundred and fifty sheep and lambs could be increased by the county board of equalization to one thousand five hundred animals of the same description. It is equally clear that an assessment on seven hundred and fifty dollars of money and credits cannot be doubled, as the board attempted to do in this case.

It must be kept in mind that the property taxed as money and credits was not classified and valued at less than its real value. The amount of the assessment, therefore, could not have been increased without adding to the property assessed, and this the county board of equalization had no authority to do. Their act, therefore, being for that purpose and to that effect, was beyond their jurisdiction, and, therefore, void.

It will be observed that Code, § 832, differs from the corresponding section (739) of the Revision. The first named authorizes the equalization as between the several townships of the county; the other as between the persons, tax payers, as well as townships.

III. Defendants insist that plaintiff has mistaken his remedy, which should have been by appeal, and that *certiorari* ^{2. —: —:} will not lie. We need not determine whether ^{certiorari.} under Code, § 831, an appeal will lie from the county board of equalization in a case within its jurisdiction. In a case not within its jurisdiction *certiorari* is the proper remedy. As in such case there is no validity in the judgment rendered by the board, for the reason that the subject-matter was beyond its jurisdiction, an appeal cannot be prosecuted, for it is intended to review proceedings had within lawful jurisdiction for the equalization of the valuation of property.

This conclusion is supported by the following cases: *O'Hare v. Hempstead*, 21 Iowa, 33; *Smith v. The Board of Super-*

 Baldwin v. The C., R. I. & P. R. Co.

risors, 30 Iowa, 531; *The State v. Roney*, 37 Iowa, 30; *Harney v. Board of Supervisors*, 44 Iowa, 203.

The judgment of the Circuit Court is

AFFIRMED.

50	680
109	528

BALDWIN V. THE C., R. I. & P. R. CO.

1. **Railroads; EVIDENCE: CONSTRUCTION OF CARS.** In an action against a railroad company for damages alleged to have been received through the use of cars with double dead-woods, it was competent to introduce evidence tending to show the advantages or disadvantages of the use of cars constructed in this manner.
2. ———: **CARS OF OTHER ROADS: NEGLIGENCE.** It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employe assumes in undertaking the employment.

Appeal from Cass Circuit Court.

FRIDAY, APRIL 25.

THE plaintiff, claiming to be an employe of defendant, whose duty it was to couple and uncouple cars, was injured while engaged in the performance of his duty, without fault on his part, but through the fault and negligence of the defendant, as he claims.

The act of negligence stated in the petition consisted in having on its track cars "the couplings, bumpers or chafing irons, commonly called dead-woods," on which "were not the usual ones in use upon said road, nor such as had been in use thereon at any time during which plaintiff had been" in the employ of defendant; "but that the same were of an old and unusual pattern, not now in use upon the cars of defendant, and were imperfect and defective." While engaged in coupling such cars the plaintiff was injured. There was a trial

Baldwin v. The C., R. I. & P. R. Co.

by jury, verdict and judgment for plaintiff, and defendant appeals.

Wright, Gatch & Wright and Rising, Wright & Baldwin, for appellant.

Sapp, Lyman & Ament, for appellee.

SEEVERS, J.—I. The plaintiff had only been working for the defendant three or four days when he was injured. He had no previous experience in the business.

1. RAILROADS: evidence: construction of cars. There was no evidence tending to show the cars were out of repair. The contrary clearly appeared. There is no dispute but that the cars the plaintiff attempted to couple had at each end double dead-woods on each side of the draft-iron, about a foot from it, and projecting out even with the draft-iron. The evidence did not show the cars to be faulty in their construction in any other respect. They did not belong to the defendant, but had been received on its track in the ordinary course of business from some connecting road. The uncontradicted evidence was that cars constructed as these were were used by eastern roads, and were more or less frequently hauled over western roads, including defendant's, being usually employed in the through freight business.

The double dead-woods are not used by western roads generally in constructing their own cars. It was, however, disclosed by the evidence that they are so used by the Illinois Central Railroad. The defendant's cars are constructed with but a single dead-wood on each end, through which runs the draft-iron. It did not appear from the evidence how long the double dead-woods had been used, or how old the pattern was.

The court instructed the jury as follows:

"6. The specific matters which the plaintiff charges against the defendant in this case as negligent are that it had upon its track in its yard, and required him to work about, cars

Baldwin v. The C., R. I. & P. R. Co.

which were improperly constructed, in that they had couplings and buffers of an old and unusual pattern, differing from those usually in use on defendant's road, and different from any plaintiff had before seen or worked with, and more dangerous than those ordinarily in use, and that he was not informed thereof.

"It is the duty of the defendant, so far as its own cars, or cars controlled by it, are concerned, to place upon its track and in use by its employes only such as are well constructed for the purpose for which they are used, and to see that they are equipped with such appliances as experience shows are best calculated to insure the safety of its employes.

"It is also the duty of the defendant, under the law, to receive and draw over its railway the cars of any connecting railway when requested, provided such cars are in good repair, and properly constructed and equipped. But the defendant is not obliged, and ought not to so receive upon its track and compel its employes to handle, cars which by reason of want of repair or faulty construction, or improper appliances, are shown by experience to be so dangerous to the lives of its employes as that ordinary prudence would forbid their use; and if the cars which caused the injury to plaintiff were, by reason of having the double dead-woods or buffers, so extraordinarily dangerous to handle as that ordinary prudence would forbid their use, then it would be negligent on the part of the defendant to either have such cars of its own on its road, or to receive from other roads and transport them, and require its employes to handle them."

This instruction submits to the jury to be determined—*First*, whether cars constructed as these were are "more dangerous than those ordinarily in use;" *second*, have the cars in question been "shown by experience to be so dangerous to the lives of its employes as that ordinary prudence would forbid their use;" and, *third*, whether the cars were, by reason "of having the double dead-woods or buffers, so extraordinarily dangerous to handle as that ordinary prudence would forbid

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their use." If these several propositions, or any of them, were found in favor of the plaintiff, then, as a matter of law, the defendant was negligent in receiving and having such cars on the road.

The jury were further instructed, that "in determining whether cars so equipped with double dead-woods or buffers are so unusual, old-fashioned and dangerous as that it will be negligent to use them, you ought to consider the difference between their construction and that of other patterns, the manner in which couplings have to be made, whether the defendant has such cars of its own in use, and how generally they are in use upon well equipped roads, and whether or not any discrimination has ever been made by railroad companies or experienced railroad men against cars so constructed, and any other matters shown in evidence bearing on this question."

This instruction contains another thought at least on the same subject, which is, that in determining the question of negligence, the jury might take into consideration "whether the defendant has such cars of its own in use."

The foregoing instructions constitute the law of this case, and therefrom the conclusion is irresistible that the material question for the jury was whether these cars were more dangerous than those ordinarily in use, or so extraordinarily dangerous to handle as to make it negligence to receive them. All evidence, therefore, which had a tendency to aid the jury in solving these questions was material.

Two witnesses on the part of the defendant gave evidence as to the construction of the cars, and it is not claimed they were not competent as experts. They were asked by counsel for defendant what advantage double dead-woods afforded to cars; what effect, if any, they would have in protecting the cars from being driven together in the course of transportation; whether, with a higher degree of caution, cars so equipped could be coupled with safety. Upon the grounds of

incompetency and irrelevancy, objections to these questions were sustained.

The questions were evidently designed to elicit from the witness that the cars were not improperly constructed, and that they possessed certain advantages because of the double dead-woods. If this had been shown it would have tended to justify their use. Even if more dangerous to employes, the other advantages might more than overbalance this defect. Employes are only entitled to have used the best practical appliances, having in view the business of the road. It will not do to say that only such appliances shall be used as will render accidents impossible. The additional danger from such cars must be regarded as ordinary and incidental to the business. If their use was justifiable under any circumstances, the degree of caution required was material, and whether or not they could be coupled with safety.

The case at bar, we think, is distinguishable from *Hamilton v. D. V. R. Co.*, 36 Iowa, 31, and *Muldowney v. I. C. R. Co.*, Id., 462. In the former the question was: "What is the proper way to couple cars when timber projects" over the end of the cars? This question had reference to the conduct of the plaintiff, and the design was to show he had not used proper care; and it was said: "Certainly an opinion of the witness in regard to the caution exercised by the plaintiff is not admissible."

In substance the same ruling, under a different state of facts, was made in the Muldowney case. It is admitted no general rule can be laid down on this subject. The nearest approach thereto is, we think, stated in the Muldowney case. It is there said, among other things: "Where the question so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it," the opinion of witnesses competent to speak should be received.

The construction of cars, the mode and manner of operating them, and the effect of a particular thing on their safety

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and usefulness, is a habit, study or science. We feel satisfied that the ordinary juror would not know the effect of these double dead-woods, or whether they possessed any advantages or disadvantages over others. We, therefore, think the court erred in excluding the evidence sought to be introduced.

II. Taking the foregoing instructions together, the rule is laid down that the defendant was bound to receive and haul ^{2. —: cars of other roads: negligence.} these cars over its road only in the event the jury should find they were in good repair and properly constructed, and the jury were authorized to find, because of the double dead-woods, they were improperly constructed, notwithstanding the uncontradicted testimony showed they were, in the usual course of business, used on other roads.

As has been said, it was the duty of the defendant to make use of the best practicable appliances known and in use in the construction of its own cars. *Greenleaf v. I. C. R. Co.*, 29 Iowa, 14. But what should be the rule in a case like the present was not determined.

If the jury have the right to infer negligence because of the double dead-woods, then it is and must continue to be negligence, in and of itself, for the defendant to receive such cars, or haul them over its road. This precise question, as to cars constructed like these, was determined in *I. B. & W. R. Co. v. Flannigan*, 77 Ill., 365, and it was held that such act did not constitute negligence.

It must be borne in mind that the question is whether it is negligence for the defendant to receive and transport cars of other roads in general use, and in the ordinary course of business, which are not constructed with the most approved appliances. Public policy has some bearing on this proposition. It is undoubtedly of great importance to the trade and commerce of the country that a car once loaded should go through to its destination without breaking bulk. It is unnecessary, it is believed, to enlarge on this point, as its importance will be readily acknowledged. Suppose, then, the Union Pacific Railroad Company should deliver a car con-

Baldwin v. The C., R. I. & P. R. Co.

structed as these were to the defendant, which was loaded with merchandise destined for New York, and as provided in the Code, § 1292, and in strict accord therewith request the defendant to transport the same, would the defendant be bound to receive such car, and for a refusal would it be liable in damages, the only ground of refusal being that it was dangerous to its employes to transport such a car; while on the other hand it would be shown that cars so constructed were in use on all other roads. It is sufficient to say that it admits of great doubt whether such a defense should be permitted to prevail.

The occasional or frequent use of such cars on any road, in the ordinary course of business, is one of the ordinary risks an employe assumes. He knows or is bound to know that cars from other roads are being constantly hauled over the road whose employe he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed. To our knowledge, at least, there is no general rule in relation thereto, and the evidence in this case discloses the fact that none such exists. He may well require that the cars provided by the company whose employe he is should have all the modern appliances, but it is not reasonable that he, at the expense of the commerce of the country, should require this as to all other cars that may be transported in the usual and ordinary course of business. The question is not in the case whether one company is bound to receive from another cars which are out of repair. We have, therefore, no occasion to determine it.

It follows, from what has been said, that in giving the instructions aforesaid the court erred.

REVERSED.

Noel v. Horton.

NOEL V. HORTON.

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d138	165

1. **Fraudulent Representations; SUBJECT-MATTER.** Fraudulent representations, relating not to the subject-matter of the contract, but to mere matters of collateral inducement, will not justify the setting aside of a contract or conveyance.
2. ———: ———: **RULE APPLIED.** Plaintiff, having a tax deed to certain land, was induced by representations of the defendant to the effect that the land covered by the tax deed was in fact the property of his father, although the title had been fraudulently procured by the mother, and by appeals to his charity, to convey to the defendant, upon payment by the latter of the amount which would have been necessary to redeem: *Held*, that the representations were not of a character entitling plaintiff to relief.

Appeal from Dallas District Court.

FRIDAY, APRIL 25.

THE plaintiff filed his amended and substituted petition as follows:

"1. That on the ——— day of December, 1877, the plaintiff was the absolute and unqualified owner of the following described real estate situated in Dallas county and State of Iowa, to wit: The southeast quarter of section No. thirty-six (36), in township No. eighty-one (81) north, of range No. twenty-seven (27) west of the fifth P. M., Iowa. That said real estate on said date was of the reasonable value of one thousand dollars.

"2. That plaintiff held and owned said land by virtue of a tax deed, made and delivered to plaintiff by the county treasurer of said Dallas county, Iowa, on a certificate of sale of said lands for the delinquent taxes thereon for the year 1873.

"3. That on or about the twenty-first day of December, 1877, the said defendant, for the purpose of inducing the plaintiff to convey said lands to said defendant for a mere nominal consideration, to wit: by defendant paying to plaintiff only the sum of money necessary to redeem said land from

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said tax sale on the date prior to the execution of the said deed to plaintiff therefor, said defendant verbally represented to the plaintiff that while as a fact the record title and apparent ownership of said land, prior to plaintiff's tax deed therefor, was in said defendant's mother, Elizabeth Horton, but in truth and in fact the equitable right and ownership of said land, prior to plaintiff's tax deed thereon, was in the defendant's father, ——— Horton; that the defendant's said mother had prior thereto, by fraud, legal proceedings and compulsion, obtained the entire apparent ownership and control of all the estate of his said father, amounting in all to about the value of twenty thousand dollars, and thereafter abandoned defendant's said father (who was, at this said time, aged and infirm), thereby leaving him destitute of the means and property for his present support and the support of defendant's two younger brothers, who were unable to earn their own support and care for themselves, as well as a sister of defendant who was, on the date of said representations so made by defendant, in the last stages of consumption, and that said sister required the constant care and attention of the defendant; that by reason of the destitution and poverty of defendant's said father, produced as above stated, the defendant further represented to plaintiff that defendant was then obliged and compelled to care for and support said consumptive sister, and was at said time caring for and supporting said sister at his own expense; that the said tract of land aforesaid was in fact the only property undisposed of by his said mother prior to said tax sale, of his father's entire estate; that his said mother had squandered all of said estate obtained as aforesaid, and that she was then penniless and wholly unable to redeem said land from said tax sale and deed. Defendant further represented to plaintiff that a conveyance of said land to defendant at the consideration necessary only in amount to redeem the same, to wit: one hundred and three dollars, would, in view of all the facts represented as aforesaid, be an act of charity on the part of the plaintiff toward defendant.

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and his said consumptive sister, and materially aid and assist them; that defendant had only by accident learned a short time prior thereto that said land had been sold for taxes and remained unredeemed, and inasmuch as his consumptive sister needed and required his constant and immediate attention, and who then resided in a foreign State, at the home of defendant, said defendant desired plaintiff to at once convey said land to defendant, and thereby aid defendant in supporting his said consumptive sister, and at once enable defendant to return to her assistance without further delay.

"4. Plaintiff avers that believing the truth of said representations so made by said defendant as aforesaid, and wholly relying thereon, plaintiff was, in consideration thereof, thereby induced to convey said land to defendant, the said defendant at the time offering to pay to the plaintiff simply the amount of money necessary to pay to redeem said land from said tax sale on the date of the deed therefor, to-wit: the sum of one hundred and three dollars, being about one-tenth part of the value of said land, which said sum of money was paid by defendant to plaintiff, and recited in the deed as the sole consideration thereof. Plaintiff further avers that had it not been for said representation made by said defendant to plaintiff as aforesaid, whereby and in consideration whereof plaintiff was induced to convey said land to defendant for the purpose of aiding and assisting defendant and his consumptive sister, plaintiff would not have conveyed said land to defendant, but would have demanded of defendant, before conveying said land to defendant, the payment of the full value of said land, and not otherwise. Plaintiff further avers that the sum of money named in said deed is not the true consideration for said conveyance, but the same was and is simply the amount offered by defendant as a further inducement to plaintiff to part with said title to said land for the purpose aforesaid, and had it not been for said representations aforesaid the said sum would have been no inducement or consideration to plaintiff in parting with said land.

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"5. Plaintiff further avers and charges the fact to be that each and all of said statements and representations so made by said defendant to plaintiff as aforesaid were and are wholly false and untrue, and so known by said defendant to be false and untrue at the time the said statements and representations were so made by defendant to plaintiff, and at the time and date of said defendant's receiving the said conveyance for said land from plaintiff, defendant well knew that plaintiff wholly relied on the truth of his said representations, and was induced thereby to convey said land to defendant for the consideration of aiding the defendant and his sister, and at a money consideration of about one-tenth of the real value of said land, and that, at the date of the delivery of said deed to said defendant by plaintiff, defendant well knew each and all of said statements and representations to plaintiff to be false and untrue. Plaintiff further avers that said statements and representations so made by said defendant to plaintiff were made by defendant with the intent and for the purpose of cheating, wronging and defrauding plaintiff and obtaining the title to said land for a mere nominal consideration, and to avoid paying plaintiff the reasonable value thereof.

"6. Plaintiff avers that he is ready and willing to restore to said defendant the amount of the consideration paid by him to plaintiff, recited in the deed conveying said land to the defendant, and interest thereon.

"Wherefore plaintiff asks the decree of this court that said sale and conveyance of said land to said defendant be declared fraudulent and void, and of no force and effect; that said deed of conveyance be cancelled on the proper record thereof by the clerk of this court in the manner provided by law in such cases, and that plaintiff's title in and to said premises be quieted as against the said defendant and all persons claiming said premises by, through or under said defendant, and that plaintiff have such other full and complete relief as may seem meet and equitable in the premises, with costs."

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The defendant demurred to the petition upon the ground that the representations alleged in no manner affect the subject-matter of the contract. The court sustained the demurrer. The plaintiff refused to further plead, and elected to stand upon his petition, and the court rendered judgment against him for costs. The plaintiff appeals.

Perkins & Barr and *White & Woodin*, for appellant.

A. R. Smalley, for appellee.

DAY, J.—The representations relied upon relate to matters of mere collateral inducement, and not to matters affecting the essence and substance of the contract. The plaintiff knew that he was under no legal obligation to execute the conveyance or to permit redemption. No representation was made to induce him to believe that any such legal obligation existed, or that any legal compulsion could be employed. If the defendant had falsely represented that the owner of the land at the time of the tax sale was a minor or a lunatic, or that the taxes had been paid before the sale, and, relying upon such representation, plaintiff had executed the conveyance, a very different question would be presented. Representations of this character would directly affect the subject-matter of the contract. But the representations made relate to the relation and condition of the defendant, not to the land in question, but to matters of an entirely collateral character. The representations were calculated simply to arouse the sympathy of the plaintiff, and to induce him, from charitable motives, to do voluntarily what he knew he was under no legal obligation to do. However reprehensible, *in foro conscientiae*, the conduct of the defendant may be, it does not furnish any basis for equitable relief. No false impression was created in the plaintiff's mind as to anything inhering in the subject-matter of the contract. As to the distinction between legal and

1. FRAUDU-
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moral obligations see 2 Parsons on Contracts (5th Ed.), 767–769; 1 Story's Equity Jurisprudence, § 194.

AFFIRMED.

THE STATE v. THE C., R. I. & P. R. Co.

1. **Highway: ESTABLISHMENT UNDER CODE OF 1851: EVIDENCE.** Under the Code of 1851 the disqualification or inability of the county judge to act in a proceeding to establish a highway must have appeared upon the record, in order to enable the prosecuting attorney to act in his stead, and, where the record failed to show such disqualification or inability, it was not competent evidence to show that the highway was legally established.

Appeal from Polk District Court.

FRIDAY, APRIL 25.

THE defendant was indicted for obstructing a certain public highway duly laid out and established according to law, was tried, convicted, and sentenced to pay a fine of five dollars and costs. The defendant appeals.

Wright, Gatch & Wright and Carroll Wright, for appellant.

J. F. McJunkin, Attorney General, for the State.

DAY, J.—The State offered in evidence certain pages of the road record, being an order for the final establishment of the road in question, signed “W. W. Williamson, Prosecuting Attorney, Acting County Judge,” and dated May 27, 1854. The defendant objected to the introduction of this record because it appears to have been before W. W. Williamson, prosecuting attorney and acting county judge, and it fails to show the fact of the absence of the county judge of said county, or his inability to act, or the cause of such absence or inability. The court overruled the objection, and the record was admitted. After

1. **HIGHWAY:**
establishment
under code of
1851: evidence.

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the evidence was submitted the defendant asked the court to give the following instruction :

"A highway, in 1854, could not be established in substantial conformity with the law, in proceedings had before the prosecuting attorney of the county acting as the county judge, except in the absence of such judge, or his inability to act, and the record should show the fact of such absence or inability to act, and the cause thereof, and if it does not it cannot be considered by you."

The court refused to give this instruction.

Section 111 of the Code of 1851 is as follows :

"In case of a vacancy in the office of county judge, and in case of the absence, inability or interest of that officer, the prosecuting attorney of the county shall supply his place; and when a party in direct interest makes his affidavit to the fact of the interest of the judge, it will be his duty to vacate his seat for the time being, and to cause the prosecuting attorney to be notified to attend, and the judge's refusal so to do will be good cause for an appeal, which may be taken either before the matter is heard or after. When, for the same cause, the prosecuting attorney cannot act, the county clerk shall fill the place of the judge, and the affidavit must apply to both judge and attorney. When, for any of the above causes, the judge or the attorney, in his proper order, does not act, the record of the proceeding must show the fact and the cause."

The court erred, we think, in admitting the record, and in refusing to give the instruction asked. This statute clearly requires that the fact and the cause of disqualification or other inability of the county judge must appear on the record in order to confer power upon the prosecuting attorney to act. Where the record does not disclose such facts the prosecuting attorney acts without authority and his acts are void. See *Burlington University v. Executors of Stewart*, 12 Iowa, 442.

The judgment is

REVERSED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

THE STATE V. CAMPBELL.

CRIMINAL LAW.

Appeal from Dallas District Court.

WEDNESDAY, MARCH 19.

INDICTMENT for using and keeping a building for the purpose of keeping therein for sale, and selling, intoxicating liquors, contrary to law.

There was a trial by jury, verdict of guilty, and judgment. The defendant appeals.

White & Varner and North & Woodin, for appellant.

J. F. McJunkin, Attorney General, for appellee.

SEEVERS, J.—This cause was appealed in October, 1876, and is now submitted without argument. The record contains nothing but the indictment, instructions given and refused, motion for a new trial, verdict, and judgment. In such a state of the record we cannot say there was error in the trial in the District Court.

AFFIRMED.

THE STATE V. LUNDERMILK.

CRIMINAL LAW: SEDUCTION.

Appeal from Guthrie District Court.

THURSDAY, MARCH 20.

No argument for either party.

(695)

50b	695
100	9
50b	695
105	136

BECK, CH. J.—The defendant was convicted upon an indictment for seduction and sentenced to the penitentiary for three years. He has brought the case here by appeal.

There has been no assignment of errors by defendant, nor have we been favored with an argument or brief in his behalf. Neither have we had an argument for the State.

A failure to assign errors and press them in argument does not, in a criminal, as in a civil case, authorize us to dispose of it without examining the record.

The statute requires us to inspect the record and determine whether the law has been correctly administered, though no objection be formally made to the proceedings. It will be understood that in such a case our opinion must necessarily be brief, however voluminous the record may be, and however carefully we may have inspected it. We cannot discuss imaginary objections to the proceedings if we find them correct.

We have carefully inspected the record in this case and find no errors. The indictment is sufficient and the proceedings are regular. The rulings upon the admission of evidence were correct, and the instructions to the jury fully and fairly presented the law of the case. The evidence fully supports the verdict. The previous chaste character of the woman clearly appears. Her seduction by means of promises to marry her is shown by her own testimony, which is strongly corroborated by the declarations and admissions of defendant. There is nothing wanting in the evidence to establish defendant's guilt. The punishment prescribed by the sentence he richly merits.

The judgment of the District Court is

AFFIRMED.

HUNT V. DOWNS ET AL.

PRACTICE IN THE SUPREME COURT: TRIAL DE NOVO.

Appeal from Louisa Circuit Court.

WEDNESDAY, APRIL 9.

ACTION for the foreclosure of certain mortgages upon real estate. The defense was that C. W. Downs, the mortgagor, was insane when he executed the mortgages. There were also other defenses. A decree was entered for the plaintiff. Defendants appeal.

Cloud & Cloud, for appellants.

Power & Antrobus, for appellee.

ROTHROCK, J.—The action was an equitable one, and it does not appear from the record before us that any motion or order was at any time made

for a trial upon written evidence, as provided by section 2742 of the Code. The abstract contains a certificate of the trial judge that all the evidence introduced on the trial is embodied in the record, and also a certificate of a short-hand reporter as to the correctness of his transcript of the evidence. It is argued that from these certificates it should be presumed the motion and order required by the statute were made at the proper time. We think no such presumption can obtain. What is said in the case of *Ashcraft v. De Armond*, 44 Iowa, 229, as to presuming a compliance with the statute, is not in point. In the case at bar we have neither motion nor order.

This action was commenced in the year 1875. The decree was entered May 29, 1877. The appeal is, therefore, governed by section 2742 of the Code, notwithstanding its repeal by chapter 145 of the Acts of the Seventeenth General Assembly.

There were no errors assigned by appellant. In this condition of the record we are precluded from determining the case upon its merits. *Maclay v. Bunkers*, 46 Iowa, 700.

AFFIRMED.

THE STATE V. EAGAN.

Appeal from Polk District Court.

THURSDAY, APRIL 10.

THE defendant was convicted and sentenced for keeping a gambling place, and now appeals to this court.

No appearance for appellant.

No appearance for the State.

ADAMS, J.—No errors are assigned, and we discover no error by which the defendant could have been prejudiced.

AFFIRMED.

RUTT V. HOWELL ET UX.

HOMESTEAD: MISTAKE IN WRITING TO CHARGE WITH DEBT: CANNOT BE REFORMED.

Appeal from Hamilton District Court.

FRIDAY, APRIL 18.

THE petition charges that defendants are husband and wife, and that being indebted to one Snow—the assignor of the plaintiff—they gave him

a confession of judgment, dated July 29, 1869, agreeing that their homestead should be liable for the payment thereof; that the notary, or other person who drew up said confession of judgment, neglected to state fully that said defendants stipulated that the homestead should be liable therefor, and failed to describe said homestead property; that said omission was the accident, oversight and mistake of said officer or person who drew said confession; that the entry of judgment, which was prepared for the clerk to enter judgment upon said confession, by accident and mistake did not make said judgment a lien upon said homestead, as was intended by said parties.

The prayer of the petition is that said confession of judgment so signed by the defendants, and said judgment entry, may be corrected so as to conform to the true intent of the parties, and made a specific lien upon the homestead, and providing for the sale of the same on special execution.

There was a demurrer to the petition, which was sustained. Judgment was rendered against the plaintiff for costs, and he appeals.

Chase & Covil, for appellant.

Miracle & Kamrar, for appellees.

ROTHROCK, CH. J.—The confession of judgment was executed in July, 1869. Section 2281 of the Revision of 1860 provided that the homestead should be liable for debts “created by written contract executed by the persons having the power to convey, and expressly stipulating that the homestead is liable therefor.”

The claim made in the petition in brief is that the defendants verbally contracted to charge the homestead with the payment of the debt, and agreed to execute a writing to that effect, but by mistake this was not done. In other words, plaintiff claims that if terms were incorporated in the writing which by verbal agreement should have been incorporated into it, it would then bind the homestead.

Conceding that the confession of judgment is such a written contract as is contemplated by the statute, it is sufficient to say that a verbal agreement to give a lien upon the homestead is void, and, if the confession be reformed as prayed, it will not be the written contract of the defendants, but one made by decree of the court in pursuance of their verbal contract.

We think the demurrer was properly sustained.

AFFIRMED.

SALES v. KIER ET AL.

CONTRACT: CONSTRUCTION OF: ASSIGNMENT.

Appeal from Decatur District Court.

TUESDAY, APRIL 22.

ACTION at law. A demurrer was sustained to the petition, and plaintiff appeals.

Warner & Bullock, for appellant.

S. A. Gates and *John W. Harvey*, for appellees.

SEEVERS, J.—The petition is based on the following contract: “Now, at this date, August 18, 1876, Mr. Aaron Henderson retires from the firm known as Kier & Henderson, druggists, leaving an amount of three hundred and ninety-one dollars to be used in the stock until the 1st of March, 1877, at which time the said Kier may take in and pay to Henderson said amount, with interest at the rate of ten per cent from date; or, if the said Kier does not purchase, the said Henderson to make any provision he may wish with the above amount, or to invoice the stock and take half interest at invoice value, and to appropriate said amount now in stock as part payment therefor, and if said Kier can sell and make payment of the above amount to said Henderson, having his permission to do so—the goods in the house to be a protective guarantee for the payment of said three hundred and ninety-one dollars; or if the said Henderson can sell one-half at invoice price, all will be satisfactory; or if he can sell all at invoice price and ten per cent carriage, all to be satisfactory to said Kier.

“R. A. KIER.

“A. HENDERSON.”

This contract was assigned by Henderson as follows: “For the consideration of three hundred and ninety-one dollars I hereby assign all my right and interest in and to the within contract to M. A. Sales, and authorize her to use the same for her own benefit.”

The plaintiff seeks to recover of Kier & Henderson on the contract and assignment. Henderson alone appeared and demurred to the petition. The only question presented by counsel for the appellant is whether the contract is of the character contemplated in section 2084 of the Code. If it is appellant claims she is entitled to recover of Henderson, as the assignor thereof, under section 2088 of the Code.

We do not think the contract imports or contains a promise on the part of Kier to pay Henderson any money or property. The demurrer was, therefore, properly sustained.

AFFIRMED.

COOK V. SMITH ET AL.

PRACTICE: MECHANIC'S LIEN: EVIDENCE CONSIDERED.

Appeal from Marshall District Court.

FRIDAY, APRIL 25.

THIS action was brought to foreclose a mortgage. Heath & Rhem, cross-petitioners, claim to have a mechanic's lien upon the mortgaged premises. The plaintiff's claim was settled by the parties, and decree rendered by the court establishing the lien of the cross-petitioners. Defendant Anna H. Smith appeals.

Myron W. Scott, for appellant.

Brown & Binford, for appellees.

ADAMS, J.—I. The defendant filed a motion to strike out certain evidence. No ruling was made upon it, and the defendant assigns as error the failure of the court to rule upon it. Where no ruling is made upon a motion the presumption is, where it does not appear otherwise, that the attention of the court was not called to it, and that it was waived. We will say, however, that the objection to the evidence is based mostly upon the ground that the evidence is immaterial. The case is triable *de novo*, and all immaterial evidence must be disregarded, whether objected to or not.

II. The lien claimed by the appellees is for the erection of a store building, according to certain plans and specifications. The defendant filed a petition for an order that the cross-petitioners be required to produce the plans and specifications. They answered, showing that they had neither the possession of them, nor knowledge as to where they were. The court denied the petition. The defendant complains of the action of the court in this respect, but we are unable to see what other ruling could properly have been made.

III. The claim of the appellees is resisted upon the ground, among others, that the work was not properly done in that the east wall was built so as to infringe about three inches upon the adjacent lot, which was not owned by defendant. The court allowed the full amount of the appellees' claim, notwithstanding the alleged mistake. The defendant complains of the action of the court in this respect. But we do not think the evidence is sufficient to justify us in determining that the wall is not on the line. The defendant relies upon the testimony of one Bremner; but he is not only contradicted, but he admits that his survey was based upon the mere assumption that certain other buildings were correctly located. Besides, it appears from the evidence that the foundation had been built and adjacent walls partially erected at the time when the appellees took their contract. If the walls did not conform to the lines we are unable to say that the appellees are in fault.

IV. The defendant complains of a defect in the plastering, and testimony of experts was introduced tending to show that it was defective. The appellees introduced no expert testimony except that of one Canfield, who did the plastering. He testifies that the material and work were first class. He could not be regarded as an unbiased witness, and if his testimony stood alone we might regard it as overcome. But the evidence shows that at the time appellant was settling with the appellees she went with her architect for the express purpose of examining the building and determining whether the same was constructed according to contract, and both stated at the time that it was. The amount now claimed by the appellees was then agreed upon as the amount due. Such being the evidence, we are satisfied that the appellees' contract was substantially performed.

AFFIRMED.

THE STATE V. BARLOW.

50	701
105	186

CRIMINAL LAW: PERJURY.

Appeal from Lee District Court.

FRIDAY, APRIL 25.

No appearance for appellant.

J. F. McJunkin, Attorney General, for the State.

BECK, CH. J.—The defendant was convicted of perjury for swearing falsely, in an affidavit to obtain a marriage license, as a witness for the parties, that the girl named therein was more than eighteen years of age. Upon the conviction he was sentenced to imprisonment in the penitentiary for the term of two years, and from the judgment he appeals.

The record before us contains nothing more than a transcript of the indictment, and of the proceedings upon the arraignment, trial, and sentence of defendant. No errors are assigned, and we have no brief or argument for the defendant, nor for the State. As required by the statute (Code, §§ 4535 and 4538), we have carefully examined the record before us, but we fail to find any error or defect in the proceedings. The judgment of the District Court is, therefore,

AFFIRMED.

STEWART V. LUMBECK ET AL.

Appeal from Decatur District Court.

SATURDAY, APRIL 26.

ACTION to establish a mechanic's lien. The plaintiff furnished brick which were used in the erection of a house for the defendant J. B. Lumbeck. The house was built under contract by one Webber. The brick were sold to either Webber or Lumbeck. The defendants claim that they were sold to Webber. There was a judgment for the plaintiff. The defendants appeal.

J. B. Morrison and E. W. Curry, for appellants.

M. A. Mills and M. M. Kellogg, for appellee.

ADAMS, J.—The case is not triable *de novo* and the evidence is conflicting. The judgment, therefore, must be

AFFIRMED.

LEWIS V. PEARSON ET AL.

PRACTICE IN THE SUPREME COURT: TRIAL DE NOVO.

Appeal from Dallas District Court.

SATURDAY, APRIL 26.

Baugh, Smith & Sweely, for appellants.

White & Woodin, for appellee.

ROTHROCK, J.—This was an action in equity to enforce a vendor's lien for the purchase money of certain real estate. The petition was filed on the 3d day of March, 1877. There was a decree for the plaintiff. It does not appear that any motion or order was at any time made for a trial upon written evidence, as provided by section 2742 of the Code. The cause is, therefore, not triable anew in this court. No errors have been assigned by appellee. In this condition of the record the cause must be affirmed. There is an agreement at the close of appellant's abstract, signed by counsel for the respective parties, in these words: "It is agreed that this cause may be heard by the court upon the above statement." But this agreement does not dispense with the statutory requirement that errors shall be assigned.

We may say, however, that if the appellants had assigned the error that the decree does not find support in the evidence, a somewhat careful examination satisfies us that the position would not be well taken. It

seems to us that the defendant Sheeley was not an innocent purchaser of the property, but that the conveyance to him was fraudulent, and that there is no provision of the statute which precludes the plaintiff from asserting his vendor's lien as against Sheeley.

AFFIRMED.

LAWRENCE V. SMITH.

PROMISSORY NOTE: IN AID OF RAILROAD: TENDER OF STOCK.

Appeal from Poweshiek District Court.

SATURDAY, APRIL 26.

THE plaintiff avers in his petition that he is the owner and holder of an obligation executed by the defendant in these words:

"For value received I promise to pay to the Grinnell & Montezuma R. Co., or bearer, the sum of two hundred dollars, upon the completion of said railroad and cars running thereon to the depot at Montezuma, Iowa, if done within one year from the first day of January, 1875, with interest at the rate of ten per cent per annum from maturity. This note to be due and payable when the cars run to the depot above named within the time above stipulated, and on such payment the G. & M. R. Co. agree to issue to the maker of this note a certificate of stock for each one hundred dollars mentioned in this note.

"T. D. SMITH.

"*Montezuma, Iowa, May 17, 1875.*"

The plaintiff further avers that the road was completed and the cars running within the time mentioned. He, therefore, asks judgment.

The defendant demurred upon the ground that the petition failed to show that the stock had been tendered.

The court overruled the demurrer, and rendered judgment for the plaintiff. The defendant appeals.

Redman & Carr and W. R. Lewis, for appellant.

Scott & Hutchinson, for appellee.

ADAMS, J.—We think that the tender of the stock was necessary. It was so held in *Cooper v. McKee*, 49 Iowa, 286, which was an action brought upon a similar obligation given in aid of the same railroad company.

REVERSED.

THE STATE V. MULDOON.

CRIMINAL LAW : INSTRUCTIONS.

Appeal from Guthrie District Court.

SATURDAY, APRIL 26.

THE defendant was indicted for an assault with intent to murder. He was tried and convicted of an assault with an intent to inflict a great bodily injury. By the judgment of the District Court he was required to pay a fine of two hundred and fifty dollars. Defendant appeals.

No appearance for appellant.

J. F. McJunkin, Attorney General, for the State.

ROTHROCK, J.—The cause has been submitted to us upon a transcript, without abstract or argument. The transcript does not contain any of the evidence. The defendant, in his motion for a new trial, claimed that certain instructions given by the court to the jury were erroneous. An exception was noted to the overruling of the motion for a new trial. We have examined the instructions and are satisfied with their correctness. No other question is presented by the record before us.

AFFIRMED.

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ACTION.

See PARTNERSHIP, 5.
PRACTICE, 7.

ADMINISTRATOR.

See CONVEYANCE, 1.

ADVERSE POSSESSION.

See CONVEYANCE, 7.

ALTERATION.

See EVIDENCE, 6, 7.
RECEIPT, 1.

APPEAL.

1. **DISMISSAL.** Where a cause is dismissed because of the non-appearance of the plaintiff, and judgment is rendered against him for costs, an appeal will not lie from such judgment. *Stricker v. Holts*, 291.

See JURISDICTION, 1.

NEW TRIAL, 1.

PRACTICE, 6.

ARBITRATION AND AWARD.

1. **SETTING ASIDE AWARD: BURDEN OF PROOF.** Where parties have submitted their controversy to arbitration, the one who seeks to set aside the award, on the ground of mistake, must not only clearly establish the mistake, and that he was prejudiced thereby, but also must show that if the mistake had not occurred the award would have been different. *Gorham v. Millard et al.*, 554.

ASSIGNMENT.

1. **FRAUD.** Evidence considered which was *held* insufficient to support a claim that an assignment of a bond for a deed was procured in fraud of the assignor. *Baldwin v. Wheeler et al.*, 46.

2. **BONA FIDES: PREFERENCE.** An assignment of his property by a debtor in good faith, preferring certain creditors, is not invalid. *Gray v. McCallister et al.*, 497.

See **PROMISSORY NOTE**, 10, 11.

TAXATION, 6.

TORT, 1, 2.

ATTACHMENT.

1. **WHERE STATE IS PLAINTIFF.** Demand of payment must first have been made of the party against whom an attachment is sought to entitle the State thereto under sections 3005 and 3006 of the Code. *The State v. Morris*, 203.
2. **CAUSE FOR.** An affidavit to the effect that the defendant is in another State, and that he is about to sell or remove his property, is not sufficient to authorize an attachment. *Id.*

ATTORNEY.

1. **FEES: PLEADING.** Where an attorney claimed a certain amount for services, and the defendant admitted the services were rendered, but said they were rendered under a special contract, and denied they were of the value claimed, *held*, that the defendant's admission did not entitle the plaintiff to judgment for the amount claimed. *Tempelin v. Henkle*, 95.

See **CORPORATIONS**, 4.

BAIL.

1. **RECORD.** In an action on a bail-bond, the introduction of the record of forfeiture is admissible, even though it fail to show that the defendant was called in open court. *The State v. Hirronemus*, 545.
2. **SURRENDER OF DEFENDANT: DISCRETION OF COURT.** It requires clear proof of abuse of discretion of the court, in refusing to remit a forfeiture, to justify interference with the court's action. *Id.*
3. **MEASURE OF DAMAGES.** The measure of damages is the penalty of the bond, and not the fine imposed and costs. *Id.*
4. **REMISSION: DISCRETION OF COURT.** The remission of the whole or any part of a forfeited bond, after the defendant has been surrendered, rests within the discretion of the court, and his action will not be reversed unless an abuse of discretion be shown. *The State v. Kraner*, 575.
5. **EXONERATION.** To exonerate himself the bail must arrest and surrender the party indicted to the sheriff, upon presenting him with a copy of the bond. *The State v. Kraner*, 582.
6. ———: **DISCRETION OF COURT.** The court may, at his discretion, remit the whole or any part of the amount of the bond before judgment is entered, if the defendant be surrendered; but the action of the court in such case will not be reversed unless an abuse of discretion is shown. *Id.*

7. ———: OFFICER. The failure of the sheriff to arrest the party indicted when the bail presents the bond, will not exonerate the bail from liability upon his undertaking. *Id.*

BOARD OF SUPERVISORS.

1. COLLECTION OF TAXES. The board of supervisors may employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty. *Wilhelm v. Cedar County*, 254.
2. ———: RATIFICATION OF CONTRACT. Ratification of a contract for compensation with such agent, made by the treasurer and county attorney, cannot be inferred from the fact that the treasurer reported it to the board, who acquiesced therein. *Id.*

See TAXATION, 10.

CASES IN IOWA REPORTS CITED AND FOLLOWED.

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CHAMPERTY.

See CONTRACT, 11.

CONSIDERATION.

See CONVEYANCE, 2, 4.

PROMISSORY NOTE, 5, 6, 7, 8.

CONSTITUTIONAL LAW.

1. **TAXATION: REMISSION OF PENALTIES.** Chapter 29, Laws of 1874, requiring the board of supervisors to remit the penalties upon unpaid taxes when not collected in four years, is not in conflict with the constitution as impairing the obligation of the contract between the treasurer and the county. *Beecher v. The Board of Supervisors of Webster county et al.*, 538.
2. ———: ———. Nor is it liable to the constitutional objection that it is a special law for the assessment and collection of taxes. *Id.*
3. ———: ———. The statute is not against public policy as encouraging delinquencies in the payment of taxes. *Id.*

See SCHOOL DISTRICT, 2.

CONSTRUCTION.

See CONTRACT, 8, 10, 12.

ELECTION, 1, 2.

INSURANCE, 11.

RAILROADS, 2.

CONTRACT.

1. **OFFER: VENDOR AND VENDEE.** An offer to sell upon certain conditions with respect to price and warranty, unless otherwise specified or withdrawn, is to be deemed a continuing one for a reasonable time. *Judd & Co. v. Day Brothers*, 247.

2. **BREACH OF: DAMAGES.** The damages recoverable for a breach of contract are such as may reasonably be considered to have arisen naturally from such breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it. *The Mihills Manufacturing Co. v. Day Brothers et al.*, 250.
3. **SALE.** If the vendor believes in good faith, or has reasonable grounds for believing, that the vendee is in embarrassed or failing circumstances, he has the right to demand the cash, or reasonable security, before delivering the goods, even if the course of dealing between the parties were otherwise with respect to time of payment. *Id.*
4. **RESCISSION: FRAUD.** An action for the rescission of a contract on the ground of fraud must be commenced within five years from the time of the discovery of the fraud; and the defendant, in pleading the statute, is not bound to show a continuous residence in the State during that period; but the plaintiff, if he seek to avail himself of the exception thereto, has the burden of bringing the case within it. *Evans v. Montgomery et al.*, 325.
5. ———. A party who has recognized the validity of a contract, after the discovery of an alleged fraud in its inception, cannot afterward maintain an action to rescind it on the ground of such fraud. *Id.*
6. **CORPORATION.** A contract between the officers of a corporation, by which such officers were to derive advantage or profit from their positions, by purchases made nominally for the company but really for themselves, is void as against the other stockholders. *The Blair Town Lot & Land Co. v. Walker*, 376.
7. **SALE OF GOOD-WILL.** Where a land agent sold his business and the good-will thereof to another, with an agreement not to re-engage in the business in the same place for three years, it was *held*, that after the expiration of that time he was not debarred by the contract from soliciting the agency for the same lands he had in charge when the contract was made. *Hanna v. Andrews*, 462.
8. **LEASE: CONSTRUCTION OF.** A contract for the lease of a farm provided that a failure to perform a certain condition before a time specified should work a forfeiture: *Held* that, the parties having voluntarily entered into the contract, the fact that the condition was a harsh one would not prevent a forfeiture upon non-performance. *Patton v. Bond*, 508.
9. ———: **AGENCY.** The lessee claiming that he was released from liability for failure to comply with the condition, by one whom he alleged to be the agent of the lessor, whose authority was denied by the latter, the question of agency should have been left to the jury. *Id.*
10. **CONSTRUCTION: WARRANTY.** Plaintiff having sold defendant a combined reaper and mower, with a warranty that if upon one day's trial it did not work well it should, upon notice thereof, be put in order, it was *held* that the purchaser was authorized to try it not only as a mower but also as a reaper, and that he was not bound to give notice under the contract until he had tried it for both uses. *McCormick v. Basal*, 523.
11. **CHAMPERTY.** An agreement by a mortgagee that he would foreclose a mortgage executed for his protection as surety, and authorize the sheriff's deed to be made to the payee of the note upon which he was surety, in consideration that he should be released as such surety, and be reimbursed for a certain sum he had already paid on the note, was *held* not to be champertous. *Cooley v. Osborne et al.*, 526.

12. **CONSTRUCTION OF: RAILWAY GRADING.** A contract for grading a railway provided that the company might relocate its road, and change the grade line if deemed expedient; that whether the work became greater or less by any change that might be made, the contractors should be paid only for the actual work done. The work was divided into sections so as to make the excavation and embankment in each as nearly equal as possible. The line was changed after the contract was made so that a certain number of feet, consisting of excavation, were included in a section wherein they were paid only for embankment: *Held*, that plaintiff, having been once paid for his work, could not demand payment upon a sectional division which would give him more. *Fish v. Wolfe, Carpenter & Angle et al.*, 637.

See BOARD OF SUPERVISORS, 2.

CORPORATIONS, 12.

DAMAGES, 1.

PARTNERSHIP, 1.

SURETY, 2.

CONVEYANCE.

1. **MISTAKE: ADMINISTRATOR.** To authorize a conveyance by an administrator to be set aside, on the ground of mistake, it is not sufficient to establish that the grantee knew the grantor had a personal interest in the land conveyed, but it must also be made to appear that he did not intend to convey in his personal as well as representative capacity. *Donaho et al. v. Smith*, 218.
2. **CONSIDERATION: ESTOPPEL.** S., being indebted to plaintiff upon an obligation dated February 3, 1874, and which was past due on September 3, 1874, executed his note for four months at that time, dating it back to the time when the first obligation was executed. At the same time his wife executed deeds to certain real estate, lying in different counties, to secure the payment of the note; and plaintiff at the same time executed a defeasance, thereby agreeing, upon the payment of interest at the end of every six months, and the payment in full of principal and interest at twelve months from the time of the execution of the note, to reconvey: *Held*, that the conveyance by the wife to secure her husband's antecedent debt was sustained by a valid consideration; the acceptance thereof by the plaintiff, and the execution of the defeasance, estopping him from proceeding at once to collect the note. *ADAMS, J., dissenting. Lomar et al. v. Smyth & Co. et al.*, 223.
3. **WARRANTY: TRUSTEE.** If a trustee bind himself by a personal contract, though he describe himself as trustee, he is liable upon his covenant, as he would be in case the property were held and conveyed in his own right. *Bloom v. Wolfe*, 286.
4. ——— : **CONSIDERATION.** In an action upon a covenant of warranty the covenantor is liable for the real consideration paid by the covenantee, without regard to the parties receiving it, or the manner of its appropriation. *Id.*
5. **MISTAKE OF LAW: EQUITABLE JURISDICTION.** Where, under a mistake of law, a conveyance by a guardian was made to include an interest of his wards which he and the grantee were alike ignorant of, it was *held* that equity would relieve the wards of the consequences of the mistake. *Baker et al. v. Massey et al.*, 399.

6. **CONSIDERATION : ESCROW.** Where a party placed a deed in the hands of another, as an escrow, to be delivered whenever the grantee, a railway company, should erect a depot at a given location, and the company platted the land and paid taxes thereon, but never erected the depot, the road being long afterward constructed and a depot erected by another company, it was *held* the company acquired no title by the deed. *The S. C. & I. F. Town Lot & Land Co. v. Wilson et al.*, 422.
7. ——— : **ADVERSE POSSESSION.** The platting of the land, and payment of taxes thereon, did not entitle the company to protection by adverse possession. *Id.*
8. **COVENANTS OF WARRANTY : MORTGAGE.** The mortgagee of real estate is entitled to the protection of the covenants of warranty under which the mortgagor purchased. *Rose v. Schaffner et al.*, 483.
9. **EQUITABLE JURISDICTION.** R. purchased land from H. with covenants of warranty, and afterward executed a mortgage thereon to plaintiff. Through several intervening conveyances the title of R. passed to D., when it was found that the title acquired from H. had wholly failed, whereupon, in ignorance of the existence of the mortgage of plaintiff, H. paid to D. the amount of its liability on the covenant of warranty : *Held*, that in an action to foreclose the mortgage, equity had jurisdiction to require D. to repay so much of the amount received as was necessary for the protection of H. *Id.*

CORPORATIONS.

1. **NEGLECT OF STOCKHOLDER : TRUSTEE : FRAUD.** The capital stock of a corporation consisted of one hundred thousand dollars, evidenced by one thousand shares of stock, of which A., the president of the company, held seven hundred and sixty-nine shares. The articles limited the indebtedness of the company to twenty-five thousand dollars. In 1871 he borrowed a certain sum of the Newark Savings Bank, pledging seven hundred shares of the stock as collateral, at the same time surrendering his certificates of stock, and receiving in place thereof new certificates, seven hundred being issued to him as trustee, without specifying the *cestui que trust* or character of the trust, and the remainder to him in his own right. In 1872 bonds of the company to the amount of one hundred thousand dollars were issued, and afterward sold. Afterward the articles of incorporation were amended at a pretended meeting, of which no notice was given, permitting the issuance of bonds to retire the stock of the company, and bonds were issued, secured by deed of trust, which were purchased by the defendant the Charter Oak Life Insurance Company for value, and without notice of the fraudulent acts of A. : *Held*, that the Newark Savings Bank, having the power to control the corporation and failing to do it, and negligently permitting A. to exercise such control, would stand in the same relation to the bondholders as A. himself, and that the bonds issued under the amended articles were entitled to protection. *The Des Moines Gas Company v. West et al.*, 16.
2. **BONDS : NEGOTIABILITY OF.** The bonds issued and purchased by the insurance company are entitled to protection in its hands, whether they are negotiable or not. *Id.*
3. **STOCKHOLDERS.** It was unnecessary that the stockholders should be made parties in this action to subject them to the superior equities of the bondholders. *Id.*

4. **LIEN OF ATTORNEY: PRIORITY OF LIENS.** The attorney for the company would not have a lien upon the funds in the hands of the company at the time of the appointment of a receiver, which would be superior to the lien of the trust deed executed to secure the bonds. *Id.*
5. **SERVICE UPON AGENT: JURISDICTION.** In an action against a corporation service may be made upon any agent, general or special, charged with the business of the corporation in the county where suit is brought, if it arises out of or is connected with the business of the special agency in that county. *The Centennial Mutual Life Association v. Walker et al.*, 75.
6. **POWERS.** Where the articles of a corporation do not clothe it with power to raise and control funds for a specified purpose, it has no authority to take a note executed to promote such a purpose, and the collection of such a note cannot be enforced by the corporation. Per BECK, J., ROTHROCK, CH. J., *concurring*. *Simpson Centenary College v. Bryan*, 293.
7. ———. The fact that plaintiff's articles of incorporation did not authorize it to raise an endowment fund, should not be regarded as a prohibition upon the raising of such a fund. Per ADAMS, J., SEEVERS and DAY, JJ., *concurring*. *Id.*
8. **ORGANIZATION AND PUBLICITY.** The word "and" in section 1068 of the Code should be read as "or," and stockholders of a corporation are held where there is a failure to comply substantially with the requirements of the statute with respect to organization or publicity. *Eisfeld v. Kenworth et al.*, 389.
9. **PUBLICATION.** The failure to publish a notice of incorporation is a substantial failure, subjecting the incorporators to individual liability. *Id.*
10. **AMENDMENT OF ARTICLES: RECORDING OF.** Where a corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape the obligation of the contract by setting up a want of record of the amended articles. *Humphrey v. The Patrons' Mercantile Association*, 607.
11. **UNAUTHORIZED INDEBTEDNESS.** Private corporations are responsible at least to the extent of the consideration received for indebtedness assumed to be contracted in excess of the limit imposed by the articles of incorporation. *Id.*
12. **ACTS OF AGENTS: CONTRACT.** An acceptance by a corporation of the benefits of a contract, with knowledge of the fact that such contract, but for such acceptance, would not be binding upon it, will constitute an adoption of the contract, and render the corporation liable upon it. *Id.*

See CONTRACT, 6.

PROMISSORY NOTE, 4, 12.

RAILROADS, 4, 5, 6.

CRIMINAL LAW.

1. **INDICTMENT: PRACTICE.** An indictment presented in the proper court and properly filed therein, is not invalid because of an indorsement thereon reciting that it was found in another county. *The State v. Smouse et al.*, 43.

2. **SURPLUSAGE.** Where an indictment charges two offenses, but alleges that one of them was committed in another county, the latter allegation constitutes mere surplusage. *Id.*
3. **LARCENY: RECENT POSSESSION.** An instruction in these words was held to be correct: "When property recently stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into the possession thereof; and, unless he shows that he came honestly into possession of said property, the law will presume that he stole the same." *The State v. Hessians et al.*, 135.
4. **EVIDENCE.** The admissions of one accused of the crime of adultery with defendant were *held* not to be competent evidence against him. *The State v. McGuire*, 153.
5. **PRACTICE.** Where several parties have been jointly indicted, and they demand separate trials, the order in which they shall be tried may be determined by the district attorney under the direction of the court. *The State v. Hudson*, 157.
6. **EVIDENCE.** Testimony tending to show that defendant, who was indicted as an accessory, furnished money to aid his co-defendant, who had admitted his guilt, to escape, was properly admitted. *Id.*
7. ———. After a witness testified that defendant, after being held to answer, told him he would like to settle the difficulty, it was not error to permit him to testify further that defendant "looked as if he felt badly." *Id.*
8. ———: **PRACTICE.** The order in which evidence shall be introduced rests, under the direction of the court, within the discretion of the party introducing it. *Id.*
9. ———. The acts and declarations of one who has been shown to have been engaged with defendant in prosecuting the common design are admissible in evidence against him. *Id.*
10. **RAPE.** Upon the trial of one indicted for rape, an instruction directing the jury that they might find the defendant guilty if the woman failed to resist because she was imbecile, was *held* to have been properly given, although the record contained no evidence tending to show imbecility. *The State v. Atherton*, 189.
11. ———: **ASSAULT.** A person may be indicted for rape, and if the conviction for that offense is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with intent to commit rape. *Id.*
12. **SALE OF MORTGAGED PROPERTY.** An indictment for larceny, growing out of the sale of mortgaged property, must aver that the mortgage was unsatisfied at the time of the offense charged. *The State v. Gustafson*, 194.
13. **GOOD CHARACTER.** It is proper to instruct the jury that, in passing upon the guilt or innocence of the accused, proof of good character constitutes an ingredient to be considered by them, without regard to the character of other evidence, and that its weight is to be determined by them. *Id.*

14. SEDUCTION: CORROBORATIVE EVIDENCE. Proof of opportunity for having sexual intercourse does not constitute evidence corroborative of the prosecution upon a trial for seduction. The evidence, to be corroborative, must tend to connect the defendant with the commission of the offense. *The State v. Painter*, 317.
15. INDICTMENT; DUPLICITY. An indictment cannot be attacked for duplicity which sets out the same transaction in forms varied to meet the testimony. *The State v. Brannon*, 372.
16. LARCENY: EVIDENCE. Facts considered which were held sufficient to sustain a conviction for breaking and entering a building in the nighttime. *The State v. Moody*, 443.
17. ———: SENTENCE. Where the defendant was not an old offender, the property taken of small value, and the building entered a store, it was *held* that a sentence of eight years should be reduced to two years. *Id.*
18. EVIDENCE: HUSBAND AND WIFE. Defendant's wife having testified against him before the grand jury which indicted him, it was *held* that objection could not be made thereto after conviction. *The State v. Houston*, 512.
19. ———. Nor could the fact that witnesses were examined on the trial whose names were not upon the indictment, be taken advantage of by objection first raised after conviction. *Id.*
20. BENCH WARRANT: JURISDICTION. When a defendant voluntarily appears and submits himself to the jurisdiction of the court, the issuance of a bench warrant is unnecessary. *The State v. Ray*, 520.
21. JUDGMENT. The failure to render judgment for the payment of a fine until the term after the one when the defendant was convicted, was *held* not to constitute error. *Id.*
22. AMENDMENT OF INFORMATION. An information may be amended upon application to any extent which the court may deem consistent and proper. *The State v. Doe*, 541.

DAMAGES.

1. MEASURE OF: BREACH OF CONTRACT. The measure of damages for a breach of contract for the exclusive sale of an article of merchandise is the value of the agent's time during the period he was employed under the contract, with reasonable expenses added, and diminished by the sum actually earned. *The Wilson Sewing Machine Co. v. Sloan et ux.*, 368.
2. INTERFERENCE WITH SALE. A party owning land incumbered by a mortgage which was of record, offered the same for sale at public auction, at which there were no bidders, for the alleged reason that those intending to bid were warned by the agent of the mortgagee that the party purchasing would buy a law-suit, and that the property should not be sold: *Held*, that an action for damages would not lie against the mortgagee. *McCoy v. The First National Bank of Mount Pleasant et al.*, 577.
3. RESPONDEAT SUPERIOR. The principal is not liable for damages sustained by an employe from the negligence of a co-employe in the same

general service, notwithstanding such co-employee is higher in authority than the one receiving the injury. *Peterson v. The Whitebreast Coal & Mining Co.*, 673.

See BAIL, 3.

CONTRACT, 2.

EVIDENCE, 17, 18.

FENCES, 1.

INTOXICATING LIQUORS, 1.

MUNICIPAL CORPORATIONS, 7.

RAILROADS, 1.

DESCENT.

1. **INHERITANCE FROM CHILD.** The widow of a deceased husband will not inherit from the child who died before the death of the husband. Following *McMenomy v. McMenomy*, 22 Iowa, 148. *Will of Gustav L. F. Overdieck*, 244.

DIVORCE.

1. **ALIMONY: PRACTICE.** In an action for divorce by the wife, the failure of the husband to obey an order of the court directing the payment of alimony will only in extreme cases authorize the striking of his answer from the files. *Peel v. Peel*, 521.
2. ———: ———. Where the wife is defendant the failure or refusal to comply with the order may very properly be punished by striking the petition or dismissing the case. *Id.*

DOWER.

See HOMESTEAD, 2.

RES ADJUDICATA, 1.

ELECTION.

1. **CONSTRUCTION OF STATUTE.** The word "error," as employed in section 627 of the Code, is used in the sense of excess. *Rankin v. Pitkin et al.*, 313.
2. **EXCESS OF BALLOTS.** The fact that an excess of ballots appears to have been cast will not authorize the board of supervisors to order a new election for a particular office, for the filling of which no more than the legal number of votes were cast. *Id.*

EQUITABLE JURISDICTION.

1. **COMPULSORY REFERENCE.** Where a contract between the parties has been established or admitted, and there remains thereunder a series of calculations which are necessary to the establishment of the rights of the parties, it is within the province of the court to order a compulsory reference. BECK, CH. J., *dissenting*. *The Blair Town Lot & Land Co. v. Walker*, 376.

See CONVEYANCE, 5, 9.

PRACTICE, 12.

ESTOPPEL.

See CONVEYANCE, 2.

INSURANCE, 5.

MUNICIPAL CORPORATIONS, 5.

RES ADJUDICATA, 1.

TAXATION, 4, 9.

EVIDENCE.

1. **ADMISSION OF INCOMPETENT TESTIMONY.** The admission of incompetent evidence, tending to prove a fact established by other evidence which was not objected to, constitutes error without prejudice. *Weitz v. Ewen*, 34.
2. **PAROL TO EXPLAIN WRITING.** Parol testimony is admissible to show that a letter admitting an indebtedness was addressed to the plaintiff and referred to the account in controversy, but not to establish the amount. *Wise v. Adair*, 104.
3. **ADMISSION.** An admission of an indebtedness may be implied in an inquiry. *Id.*
4. **DEPOSITION.** Where a deposition has been taken it may be read on the trial if the witness is not in court, notwithstanding the reason given in the deposition for taking it be not a valid one. *Cook v. Blair*, 128.
5. **EXAMINATION OF WITNESS.** An objection to a question, which is simply a departure from a previous question, and put to the witness for the purpose of obtaining a modification of the former answer, may properly be sustained. *Id.*
6. **ALTERATION OF INSTRUMENT.** An alteration in a written instrument evidencing an executed contract, by the beneficiary thereunder, for whom the contract has performed its work, will not discharge the other party. *Ransier v. Vanorsdol et al.*, 130.
7. ———: **RULE APPLIED.** The insertion of the name of another party in a bill of sale after its execution and delivery, and after possession of the property has been taken thereunder by the vendee, will not divest him of the right of possession. *Id.*
8. **FRAUDULENT SALE.** The declarations of the seller of personal property, made after the sale and after he has parted with possession, are not admissible as evidence against the purchaser. The fact that an alleged sale was never in fact made cannot be established by the subsequent statements of the vendor that he is the owner of the property. *The Keystone Manufacturing Co. et al. v. Johnson et al.*, 142.
9. **EXPERT TESTIMONY.** Under an issue of breach of warranty of a machine, a witness, who testified that he had operated a similar machine six or eight years, and had seen the one in controversy in operation, was *held* competent to testify as to the kind of work it would perform. *Sheldon v. Booth*, 209.
10. ———: **MACHINIST.** A machinist is competent to give an opinion as an expert in relation to the construction of machinery. *Id.*
11. **LETTERS: PRINCIPAL AND AGENT.** Letters written by an agent to a party between whom and his principal a contract exists, with reference to the subject-matter thereof, and within the scope of his authority, are competent against the principal. *The Wilson Sewing Machine Co. v. Sloan et ux.*, 368.

12. **WRITTEN CONTRACT: FRAUD.** A letter or other writing is not admissible to vary or enlarge a written contract between the parties; but it may be admissible for the purpose of showing that fraudulent representations were made as an inducement to the contract. *Id.*
13. **PATENT AMBIGUITY.** Where, by the terms of a contract of subscription, a party undertook to give for the purpose of the subscription "twenty acres of land," it was *held* that the uncertainty of description, or ambiguity, could not be rendered certain or explained by parol. *BECK, CH. J., dissenting. Palmer v. Albee, 429.*
14. **DEED: PRACTICE.** Where, after amendment, a tax deed was admitted in evidence, which had been rejected before the amendment was made, *held*, that the rejection of the deed in the first instance did not constitute error of which advantage could be taken. *Walker et al. v. Beaver et al., 504.*
15. **ADMISSIBILITY: PLEADING.** Under an allegation that defendant received and acted under written instructions, he could not introduce evidence of conversations with plaintiff's agents with respect to the manner in which he was to perform his duties. *The Howe Machine Co. v. Woolly et ux., 549.*
16. **IDENTIFICATION OF PARTY.** It is competent to identify a party to the record of a former action and decree therein by parol evidence. *Car-michael v. Vandebur and Hopkins, 651.*
17. **RAILROADS: PERSONAL INJURIES.** It was competent, in an action against a railroad company for damages for personal injuries, to show the compensation the plaintiff was receiving at the time the injury occurred. *Kline v. The K. C., St. J. & C. B. R. Co., 656.*
18. **EXPERTS.** An inquiry with respect to the ability of the plaintiff, after the injury, to perform certain services, involved no question of skill, science or trade, and was not competent to be addressed to a witness testifying as an expert. *Id.*

See BAIL, 1.

CRIMINAL LAW, 4, 6, 7, 8, 9, 13, 14, 16, 18, 19

EXTRADITION, 1.

FOREIGN JUDGMENT, 2.

HIGHWAY, 1.

INSURANCE, 7, 8.

PRACTICE, 3.

PROMISSORY NOTE, 2, 3.

RAILROADS, 7.

VENDOR AND VENDEE, 6.

EXTRADITION.

1. **REQUISITION: EVIDENCE.** The determination of the Governor that the sworn evidence accompanying a requisition is sufficient to establish the facts upon which the requisition is based, is not conclusive of the matters therein set forth. *Jones and Atkinson v. Leonard, 106.*

2. ———: WHO IS A FUGITIVE. A citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another State, upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the Constitution. *Id.*

FENCES.

1. DIVISION LINES: DAMAGES. The action of fence viewers in locating and apportioning division lines of fence is not conclusive, and it is competent for a land-owner to show, in a proper action, that a fence was located upon his land, and not upon the division line, and he may recover damages therefor. *Peschongs v. Mueller*, 237.

FOREIGN JUDGMENT.

1. LAWS OF ANOTHER STATE. In an action on a foreign judgment the laws of the State in which it was rendered, in the absence of evidence to the contrary, will be presumed to be the same as ours. *Webster v. Hunter*, 215.
2. JURISDICTION: EVIDENCE. The return of an officer, showing service of process, by which the court claimed to obtain jurisdiction, may be contradicted by parol evidence. *Id.*

FRAUD.

See ASSIGNMENT, 1.

CONTRACT, 4, 5.

CORPORATIONS, 1.

EVIDENCE, 8, 12.

PROMISSORY NOTE, 12.

VENDOR AND VENDEE, 1, 2.

FRAUDULENT REPRESENTATIONS.

1. SUBJECT-MATTER. Fraudulent representations, relating not to the subject-matter of the contract, but to mere matters of collateral inducement, will not justify the setting aside of a contract or conveyance. *Noel v. Horton*, 687.
2. ———: RULE APPLIED. Plaintiff, having a tax deed to certain land, was induced by representations of the defendant to the effect that the land covered by the tax deed was in fact the property of his father, although the title had been fraudulently procured by the mother, and by appeals to his charity, to convey to the defendant, upon payment by the latter of the amount which would have been necessary to redeem: *Held*, that the representations were not of a character entitling plaintiff to relief. *Id.*

See VENDOR AND VENDEE, 10.

GOOD WILL.

See CONTRACT, 7.

HEIR.

1. **ADOPTED CHILD.** Where a father adopted two children of his daughter, and afterward died, leaving no will, it was *held* that the children so adopted would inherit from him as his own children, and would also inherit the share of their deceased mother. *Wagner v. Varner*, 532.

See DESCENT, 1.

HIGHWAY.

1. **ESTABLISHMENT UNDER CODE OF 1851: EVIDENCE.** Under the Code of 1851 the disqualification or inability of the county judge to act in a proceeding to establish a highway must have appeared upon the record, in order to enable the prosecuting attorney to act in his stead, and, where the record failed to show such disqualification or inability, it was not competent evidence to show that the highway was legally established. *The State v. The C., R. I. & P. R. Co.*, 692.

HOMESTEAD.

1. **JUDGMENT: MORTGAGE.** A judgment against the surviving husband is not a lien upon his homestead right in the lands of his wife, unless he shall have abandoned the same, nor can he create a valid lien thereon by the execution of a mortgage. *Smith v. Eaton et al.*, 488.
2. **DOWER: SURVIVOR MUST ELECT.** The surviving husband or wife cannot enjoy at the same time both dower and homestead in the real estate of decedent, and must elect which of those rights he or she will take. *Stevens et al. v. Stevens et al.*, 491.
3. **VERBAL AGREEMENT.** The homestead cannot be subjected to liability for debt upon a mere verbal agreement. *Rutt v. Howell et ux.*, 535.
4. **———: CONFESSION OF JUDGMENT.** An agreement in a confession of judgment to waive the protection of exemption laws, and to permit execution to issue against any property of the judgment debtor, homestead included, is not such a written contract as will subject the homestead to liability. *Id.*

HUSBAND AND WIFE.

1. **TRUST.** A deed of trust by a husband, in favor of his wife, provided that the rents and profits of the property conveyed should be paid to the wife, and that she should control them for her sole and separate use, independent of the control of her husband: *Held*, that upon the death of the wife the husband became entitled to one-third of the land in fee, and to a life estate in the remainder. *Conrad & Ewinger et al. v. Starr et al.*, 470.
2. **EXEMPTION FROM EXECUTION.** Personal property of the wife, exempt from execution in her hands, does not at her death vest in her husband, but goes to her administrator. *Wilson v. Breeding*, 629.

See CRIMINAL LAW, 18.

INJUNCTION.

See NUISANCE, 5.

TAXATION, 8.

INSTRUCTIONS.

1. **LIMIT OF: TRIAL.** It is impracticable for the court, in the trial of jury cases, to instruct in detail upon all the facts involved in the evidence. *Kline v. The K. C., St. J. & C. B. R. Co.*, 656.

See PROMISSORY NOTE, 9.

REPLEVIN, 1.

INSURANCE.

1. **FAILURE TO PAY ASSESSMENT.** A policy of insurance provided that the insured should pay such sums as might be assessed by the directors of the company, and that upon failure to pay an assessment, after notice duly given, the directors might annul the policy. Notice of an assessment was mailed to plaintiff, who at that time was out of the country. Upon receipt of notice, however, plaintiff forwarded the amount, but the company refused to receive it, the policy having been previously annulled: *Held*, that upon the loss of the property by fire plaintiff could not recover. *Greeley v. The Iowa State Insurance Co.*, 86.
2. **ALIENATION OF PROPERTY.** A policy of insurance stipulated that if the property should become alienated the policy would be void, unless assigned by consent of the president and secretary to the alienee. The property was sold under a decree of foreclosure—the mortgage, however, incorrectly describing the property. The year for redemption expired, but prior to that time an action was instituted to correct the mistake, which resulted in a decree therefor: *Held*, that the policy became void for non-compliance with the condition respecting alienation. *McKissick v. The Mill Owners' Mutual Fire Insurance Co.*, 116.
3. **MORTGAGE.** The mortgagor did not have the right to redeem after the decree correcting the description had been rendered. *Id.*
4. **CERTIFICATE: NEAREST MAGISTRATE.** A provision in a policy requiring that the certificate accompanying the proofs of loss should be given by the nearest magistrate, should receive a reasonable rather than a literal construction. *Williams v. The Niagara Fire Insurance Co.*, 561.
5. **UNOCCUPIED BUILDING: ESTOPPEL.** Notwithstanding the policy provided that if the premises became unoccupied during the life of the policy, without the written consent of the company indorsed thereon, the policy should be void, it was *held* that, where an agent insured an unoccupied building, and received the premium therefor, the company was estopped from denying that the policy had a legal existence. *Id.*
6. **AGENCY.** The policy not being delivered at the time it was written up, but subsequently handed to a messenger of the insured, the acts and declarations of such messenger would not be binding upon the insured without proof of his authority. *Id.*

7. **PAROL CONDITION: BURDEN OF PROOF.** The validity of the policy being determined, and defendant alleging that the premises were to have been occupied before the date on which the property was destroyed, it had the burden to establish that fact. *Id.*
8. **EXPERT EVIDENCE.** Expert evidence is not admissible to show the manner of adjustment of losses by insurance companies. *Id.*
9. **LIABILITY UPON PREMIUM NOTE.** Where the charter of an insurance company authorized it to conduct its business wholly or in part upon the mutual principle, or wholly or in part upon the cash principle, and a policy recited that the insurance in question was made in consideration of a certain specified sum as cash premium, and an installment note payable absolutely at specified times, *held*, that recovery could be had upon the note without proof of losses and an assessment as upon the mutual plan. *The Davenport Fire Ins. Co. v. Moore*, 619.
10. **COMPANY MAY REINSURE.** It is competent for an insurance company to reinsure upon its risks, and it may transfer its property, including premium notes, as a consideration therefor. *Id.*
11. **CONSTRUCTION OF STATUTE.** A failure to comply with the provisions of chapter 138, Laws of 1868, will not prevent a company from indemnifying itself by reinsurance for risks already assumed. *Id.*

INTOXICATING LIQUORS.

1. **EXEMPLARY DAMAGES.** In an action by the wife for damages for the sale of intoxicating liquors, a verdict for exemplary damages is sustained by evidence showing that defendant sold liquors to plaintiff's husband when he was intoxicated, and when he was known by defendant to be in the habit of becoming so. *Weitz v. Erwen*, 34.
2. **JUDGMENT: COLLATERAL ATTACK.** The term "liens," as employed in section 1550 of the Code, does not include the lien of a judgment, and if a judgment be rendered in favor of a party selling intoxicating liquors, it cannot be pleaded in another action that such judgment is void because the subject-matter of the action comes within the prohibition of the statute. *Smith, Cleary & Enright v. Leddy et al.*, 112.

JUDICIAL SALE.

1. **SEPARATE LOTS.** Where an officer's return of an execution sale of different lots recites that they were sold for a certain sum, but does not state whether separately or together, the presumption is that the officer did his duty and sold them separately. *Eggers et al. v. Redwood et al.*, 289.
2. **REDEMPTION.** The holder of an unsatisfied balance of a judgment cannot redeem from an execution sale made under the same judgment. *Clayton et al. v. Ellis et al.*, 590.
3. **—: LIEN.** Real estate which has been sold in part satisfaction of a judgment and redeemed by the judgment debtor does not become again subject in his hands to the lien of the judgment. Overruling *Crosby v. Elkader Lodge*, 16 Iowa, 399. *Id.*

JUDGMENT.

1. **REVIVOR AGAINST HEIRS.** The property left by a decedent cannot be subjected to the claim of a judgment creditor by an action to revive a judgment against the heirs of the decedent. *Bridgman & Co. v. Miller et al.*, 392.

2. NOTICE. Where, in an action to set aside a judgment on the ground that it was rendered without service upon the defendant, the petition set out the decree, which recited that there had been service of notice, such finding was presumed to be correct, in the absence of proof to the contrary. *Hale v. The First National Bank et al.*, 642.
3. AGREEMENT TO SELL. A contract to purchase a judgment for an agreed consideration does not give the party agreeing to purchase it such a property therein that he can incumber it, as between him and the party proposing to sell, and a third party purchasing the interest of the judgment creditor takes it free of any equities save those growing out of the original contract. *Id.*

See CRIMINAL LAW, 21.

HOMESTEAD, 1, 4.

INTOXICATING LIQUORS, 2.

PRACTICE, 15.

USURY, 1.

JURISDICTION.

1. APPEAL: RE-DOCKETING. It is not necessary that a *procedendo* should issue to give the court below jurisdiction, but if the case is re-docketed upon service of proper notice it will stand for retrial. *Becker v. Becker et al.*, 139.
2. PARTY: REPLEVIN. A person not a party to an action aided by attachment in the Circuit Court, may maintain replevin for the attached property in the District Court. *Seaton v. Higgins*, 305.
3. FEDERAL COURTS. The fact that bankruptcy proceedings have been commenced may be shown in a State court by a debtor, for the purpose of proving that the right of action upon an instrument sued on has vested in the assignee. *Seaton & Spaan v. Hinneman*, 395.

See CORPORATIONS, 5.

CRIMINAL LAW, 20.

FOREIGN JUDGMENT, 2

PROMISSORY NOTE, 1.

VENUE, 2.

JUSTICE OF THE PEACE.

1. COSTS: FEES. A justice of the peace cannot recover from the debtor his fees for the collection of a claim which he has collected without suit. Section 3804 of the Code applies to costs in an action and not to fees. *Pennington v. Beedy*, 85.

LEASE.

See CONTRACT, 8, 9.

JUDICIAL SALE, 3.

LIEN.

See CORPORATIONS, 4.

MECHANIC'S LIEN.

VENDOR AND VENDEE, 3

MECHANIC'S LIEN.

1. **MERGER.** Where a mechanic's lien, which misdescribed the property intended to be covered thereby, had been foreclosed, it was *held* that the lien did not become merged in the judgment so that another lien, correctly describing the property, might not be filed. *Gray & Stevenson v. Dunham et al.*, 170.
2. ———. The mistake in the lien is not irremediable, and it will not prevent a party who has furnished materials from claiming a lien upon the property intended to be described. *Id.*
3. **SALE OF PROPERTY.** Where the party entitled to a mechanic's lien fails to file the same until after the lapse of ninety days, during which time the property has passed to an innocent purchaser, he is not entitled to enforce his lien against such purchaser, and the rule is not varied by the fact that the vendee took the property under a bond for a deed, and made no actual payment, but simply executed his note for the purchase price. *Weston & Co. v. Dunlap et al.*, 183.
4. **COUNTY BUILDING.** A mechanic's lien cannot be established against a building owned by a county and used for county purposes. *Lewis v. Chickasaw County*, 234.
5. **BRIDGES: PRACTICE.** The mechanic's lien law is framed with reference only to property which can be sold under execution, and bridges constructed by a county are not, therefore, subject to such lien. Nor can the court, in an action to enforce a lien upon such property, render a decree for the amount found to be due, without ordering a sale of the property. *Loring & Co. v. Small et al.*, 271.
6. **TENANTS IN COMMON.** Where several tenants in common mortgaged the joint property for an improvement thereon, the tenant who expended the money without applying it as intended could not recover from his co-tenants for any improvement he might have made. *Conrad & Ewinger et al. v. Starr et al.*, 470.
7. **PRIORITY OF LIENS.** Before the enactment of chapter 100, Laws of 1876, the only manner of establishing the priority of a mechanic's lien on a building, over a pre-existing incumbrance on the land, was by the sale and removal of the building; and where the nature of the improvement was such that it could not be removed, the lien of the mechanic must have been postponed to the lien upon the land. *Id.*
8. **COMMENCEMENT OF BUILDING.** The commencement of a building, under the mechanic's lien law, is the first labor done on the ground, which is made the foundation of the building, and is to form part of the work suitable and necessary for its construction. *Id.*
9. **RIGHT OF REMOVAL.** The right of removal of a building to enforce a mechanic's lien depends upon the facts as to whether it is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain. *Id.*

10. **PRIORITY OF LIENS.** L. gave a bond for a deed to W., and afterward, W. having meanwhile assigned the bond to his wife, executed to the wife a new bond. Prior to the execution of the latter, however, a mechanic's lien accrued upon the interest of W. in the land in favor of M. & Co., of which L. had no notice: *Held*, in an action to foreclose the lien, that the claim of L. was prior thereto, and that the decree should provide for its payment in full, free from the contingency of any reduction by the costs of the foreclosure proceeding. *Millard & Co. v. West et al.*, 616.

MORTGAGE.

1. **DEED ABSOLUTE: STATUTE OF LIMITATIONS.** A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations, and when so barred that an action for affirmative relief cannot be maintained thereon, it cannot be interposed as a defense to an action by the grantee to recover possession of the property. *Richards et al. v. Crawford et al.*, 494.
2. **THREAT OF CRIMINAL PROCEEDINGS.** A mortgage executed by the wife to secure a debt of the husband, under the inducement of false and fraudulent charges of embezzlement against the husband, and threats to institute criminal proceedings against him, is void. *The Singer Manufacturing Co. v. Rawson et al.*, 634.
3. ———. The fact that the mortgaged property was purchased by the husband with the money of the party making the threats, and fraudulently conveyed to the wife, would have no tendency to show the mortgage valid. *Id.*

See CONVEYANCE, 8.

HOMESTEAD, 1.

INSURANCE, 3.

MUNICIPAL CORPORATIONS.

1. **NEGLIGENCE OF OFFICERS.** Where the officers of a city have knowledge of the construction of improvements in a negligent manner, it is no defense against the consequences of such negligence that it was not authorized by the city council, which was charged with the making of improvements. *Powers v. The City of Council Bluffs*, 197.
2. ———: **CARE REQUIRED.** While the city is not liable for the consequences of a mere mistake, in a matter to be determined by the judgment of its officers, yet it can obtain such immunity only by showing that the mistake occurred while in the exercise of reasonable skill, prudence and care. *Id.*
3. **IMPROVEMENT OF STREETS: NEGLIGENCE.** Where a city establishes grades and improves streets, and the owners of adjacent property make improvements with reference thereto, the city is liable for negligently permitting obstructions by reason of which injuries occur to the property owners, even though such obstructions leave the property in no worse condition than it was before the city had improved the streets. *Id.*

WATER-WAYS: PREVIOUS FLOODS. It is the duty of a city to provide water-ways sufficient to carry off the water that might be reasonably expected to accumulate, judging from such floods as had previously occurred. *Id.*

IMPROVEMENT OF STREETS: ASSESSMENT. Where the plaintiff sought to recover of a city under an ordinance requiring the city to refund taxes erroneously levied, it was *held* that the fact that plaintiff saw the improvement, for which the tax was levied, being made without protest, would not estop him to deny the validity of the assessment, it not appearing that he knew it was the intention to assess adjacent property for its cost; nor would the fact that he paid the first instalment of the tax without protest preclude a recovery, a protest not being required by the terms of the ordinance. *Robinson v. The City of Burlington*, 240.

6. **STREET: AREA.** A city has the right to impose the conditions upon which an adjacent property owner may be permitted to excavate an area under a sidewalk, and until the conditions it has imposed are complied with, it is authorized to forbid such excavation to be made. *Davis et al. v. The City of Clinton*, 585.

7. **POWERS OF CITY: DAMAGES.** A city has the right, through its council, to authorize the purchase of a right of way for a ditch, and will be bound to reimburse the party authorized to procure it; but it cannot enter into an agreement with such party that it will construct the ditch, nor can he recover damages for any alleged injuries he may have suffered by a subsequent determination of the council not to proceed with the work. *Stewart v. The City of Council Bluffs*, 668.

See STATUTE OF LIMITATIONS, 1.

SURETY, 3.

TAX SALE, 1.

NEGLIGENCE.

1. **PLEADING.** An allegation that defendant's officers and agents negligently directed plaintiff to make a coupling between cars of a different height, which required for the purpose a crooked link, without providing such link, as he had requested them to do, for the proper discharge of his duties, set out, in connection with an averment of plaintiff's own care and diligence, a cause of action against the defendant. *Conway v. The Ill. Cent. R. Co.* 465.

2. **RAILROADS: DEGREE OF CARE REQUIRED.** Railway companies are required to use only a reasonable degree of care in providing safe cars, machinery and other appliances rendered necessary in the operation of their roads. *Id.*

See CORPORATIONS, 1.

DAMAGES, 3.

MUNICIPAL CORPORATIONS, 1, 2, 3, 4.

RAILROADS, 2, 8.

NEW TRIAL.

1. **PETITION: APPEAL.** The right of appeal expires in six months from the rendition of the judgment, and this right is not revived by filing a petition for a new trial. *Carpenter v. Brown*, 451.

2. ———: JURY. Where a petition for a new trial is filed in accordance with the provisions of section 3155 of the Code, it is for the court without a jury to "first try and decide upon the grounds to vacate or modify the judgment." *Id.*
3. NEWLY DISCOVERED EVIDENCE. A new trial should not be granted on the ground of newly discovered evidence, when such evidence, if produced, would not authorize a different judgment from that before rendered. *Id.*
4. IMPEACHING EVIDENCE. A new trial will not be granted on the ground of newly discovered evidence, when such evidence is merely impeaching in its character. *Kline v. The K. C., St. J. & C. B. R. Co.*, 656.

NOTES AND BILLS.

1. DEMAND AND NOTICE. Where a draft is in the possession of the drawer until after maturity, demand and notice are waived; and the execution of a note for the amount of the draft, with full knowledge that demand has not been made and notice given, removes the effect of the laches, if any there be. *Lomax et al. v. Smyth & Co. et al.*, 223.

NOTICE.

See JUDGMENT, 2.

NOTES AND BILLS, 1.

PRACTICE, 7.

SCHOOL DISTRICT, 6, 7.

SETTLEMENT, 3.

NUISANCE.

1. LIVERY STABLE. While a livery stable is not necessarily a nuisance, yet it may be so declared if it is built in close proximity to existing residences, and becomes seriously detrimental to the health and comfort of the occupants. *Shiras v. Olinger et al.*, 571.
2. ———: INJUNCTION. Where a livery stable had been burned down it was *held* that injunction would not lie to prevent its being rebuilt, since it might be so modified as not necessarily to become a nuisance. *Id.*

PARTIES.

1. WAGER. A party acting for himself and others, in depositing with a stakeholder the amount of a wager, cannot recover in an action against the stakeholder more than the amount contributed by himself to the wager. *Toney v. Snyder*, 73.
2. MISJOINDER OF: PRACTICE. A misjoinder of parties is assailable by motion to compel the party in error to elect. *Independent School Districts, etc., of Graham Township v. Independent School District No. 2, etc.*, 322.

3. ———. Several parties asking relief in different amounts, and requiring a distinct and separate judgment to be rendered in favor of each, cannot unite in one action against the party from whom the relief is sought. *Id.*

See JURISDICTION, 2.

PRACTICE IN THE SUPREME COURT, 5.

PROMISSORY NOTE, 11.

TAXATION, 7.

PARTNERSHIP.

1. POWERS OF PARTNERS: CONTRACT. If a party dealing with a partner has notice of a restriction upon the general powers of the partner, he cannot subject a copartner to liability upon a contract entered into in violation of such restriction. *Knor v. Buffington & Co. et al.*, 320.
2. FIRM ACCOUNTS. Where a partner had collected accounts in favor of the firm, without making any entry of the amounts so collected, it was *held*, that where the amount of such collections was ascertained he was properly chargeable therewith. *Evans v. Montgomery et al.*, 325.
3. ———: FAILURE TO KEEP. While the failure to keep accounts by the partner in charge of the partnership concerns might render an adjustment difficult, yet it could not be taken advantage of by a copartner who had commenced an action and asked an accounting. *Id.*
4. INDEBTEDNESS TO PARTNER. An action on a claim due a firm may be maintained in the firm name, although one of the partners may be entitled to the proceeds if the claim itself has not been applied to extinguish the debt due such partner. *White & Smith v. Savery et al.*, 515.
5. BAR TO ACTION. The dismissal of an action on the ground that the plaintiff cannot maintain it in his individual name, is not a bar to an action for the same cause in the firm name. *Id.*

PLEADING.

1. AMENDMENT: NEGOTIABLE PAPER. Where the petition in an action upon an order averred demand and notice, and an amendment filed after argument contained an averment of waiver of demand and notice, it was *held* that the pleadings would sustain a finding of a waiver. *Peck v. Schick & Co.*, 281.
2. DEMURRER: MORE SPECIFIC STATEMENT. Where, in an action on a promissory note, the defendant pleads want of consideration, without stating the facts upon which the defense is based, the answer is assailable, not by demurrer, but by motion for more specific statement. Per BECK, J., ROTHROCK, Ch. J., concurring. *The Simpson Centenary College v. Bryan*, 293.
3. CONFESSION AND AVOIDANCE. An allegation in an answer is to be taken as true when the plaintiff, in reply, pleads in confession and avoidance. *Clapp v. Cunningham*, 307.
4. ———: BURDEN OF PROOF. Affirmative matter set up in a reply casts upon the plaintiff the burden of proof. *Id.*

5. **DEMURRER.** Where, in an action to foreclose a mortgage, it was averred in the petition that upon default in payment of one of the notes the plaintiff elected that the whole sum secured by the mortgage should become due, it was *held* the averment was not assailable by demurrer. *Parkyn v. Travis et ux.*, 436.
6. **REPLY.** The plaintiff may file a reply later than noon of the day succeeding that on which the answer is filed, upon reasonable terms to be imposed by the court. *Williams v. The Niagara Fire Ins. Co.*, 561.

See ATTORNEY, 1.

CRIMINAL LAW, 22.

EVIDENCE, 15.

NEGLIGENCE, 1.

PRACTICE, 2, 14, 16.

REPLEVIN, 4.

PRACTICE.

1. **CHANGE OF STATUTE: TRIAL DE NOVO.** Chapter 145, Laws of 1878, relating to the trial of equitable actions, applies only to cases tried in the court below since the statute took effect. *Simondson v. Simondson*, 110.
2. **AMENDMENT.** Where an amendment, setting up a new and different defense, is filed after a part of the evidence has been introduced, and the plaintiff does not at the time indicate an unwillingness to proceed in consequence thereof, he cannot be heard to complain after a verdict has been rendered. *Sheldon v. Booth*, 209.
3. **ATTORNEY'S FEE: EVIDENCE.** Where a note provides for a reasonable amount for attorney's fee, it is erroneous for the court to fix and render judgment for an amount without evidence by which to determine it. *The First National Bank of Muscatine v. Krance et al.*, 235.
4. **SETTING ASIDE DEFAULT.** The action of the court below in refusing to grant a default for want of an answer, will not be interfered with unless an abuse of discretion be shown. *Walker v. Hutchinson et ux.*, 364.
5. **SETTLEMENT: INTERVENTION.** Where an action had been settled by the parties, and a petition of intervention afterward filed, but no notice of the filing of the petition was served upon the plaintiff until after the court had marked the cause as settled, it was *held* that a motion to strike the petition of intervention should have been sustained. *The First National Bank of Leon v. Gill & Co. et al.*, 425.
6. **INTERMEDIATE ORDER: APPEAL.** An appeal will lie from an order of the court refusing to strike a petition from the file. *Id.*
7. **COMMENCEMENT OF ACTION.** An action is commenced when the notice is served upon the defendant, and not when it is placed in the hands of the officer for service. *Parkyn v. Travis et ux.*, 436.
8. **TRIAL UPON WRITTEN EVIDENCE.** Where a case has been set down for trial upon written evidence, in pursuance of section 2742 of the Code, oral testimony is not admissible. *Harlan v. Porter et al.*, 446.
9. ———. Prior to the taking effect of chapter 145, Laws of 1878, a compliance with the provision of section 2742 of the Code was necessary to secure a trial *de novo* in the supreme court. *The Joliet Iron & Steel Co. v. The C. C. & W. R. Co. et al.*, 455.

10. **EXCEPTION.** An exception first taken three and one-half months after the decree is settled, signed and entered of record, does not furnish any basis for a review of the case. *Id.*
11. **CORRECTION OF JUDGMENT ENTRY.** Where, in an action to foreclose a mortgage, a decree of foreclosure was prayed against the mortgagor and his wife, and a personal judgment against the mortgagor, and the clerk, in making the record entry, wrote "defendants" where he should have written "defendant," and improperly inserted the name of the wife in the judgment docket, *held*, that she was entitled, nine years afterward, to have the cause redocketed and the record corrected on motion. *Shelley v. Smith et al.*, 543.
12. **EQUITABLE JURISDICTION: TRIAL BY JURY.** The overruling of a motion in an equitable action to divide the issues and try a question of fact to a jury does not constitute error, even though the court erroneously base its action upon a want of authority to grant the motion. *The Howe Machine Co. v. Woolly et ux.*, 549.
13. **CONTINUANCE.** The granting of a continuance for the reason that the reply, which was not filed until the trial term, presented a new issue, rested within the discretion of the court, and an abuse of discretion would alone justify interference with his action. *Williams v. The Niagara Fire Ins. Co.*, 561.
14. **PRAYER FOR GENERAL RELIEF.** Under a prayer for general relief a judgment may be granted without a specific prayer therefor. *Pond v. The Waterloo Agricultural Works et al.*, 596.
15. **JUDGMENT; REVERSAL.** A judgment will not be reversed for an error of the court below, unless the question involved has in some way been presented to the court, and a ruling had thereon. *Carmichael v. Vandubur and Hopkins*, 651.
16. **WAIVER OF ERROR: MOTION FOR MORE SPECIFIC STATEMENT.** The right to object to the action of the court in overruling a motion for more specific statement is waived by answering over. *Kline v. The K. C., St. J. & C. B. R. Co.*, 656.

See CRIMINAL LAW, 1, 5, 8.

DIVORCE, 1, 2.

EVIDENCE, 14.

MECHANIC'S LIEN, 5.

PARTIES, 2.

REFEREE, 1.

REPLEVIN, 3, 4.

VENUE, 2.

PRACTICE IN THE SUPREME COURT.

1. **ABSTRACT.** The abstract should contain a copy of the bill of exceptions, duly certified as containing all the evidence, or it should state that it contains all the evidence; and if this is not denied by the appellee, and shown to be untrue by an amended abstract, it will be assumed to be true. If the appellee files an amended abstract, and that is not denied by the appellant, it will be assumed to be true. *Kearney v. Ferguson*, 72.

2. ———. Errors will not be presumed, and the record and abstract must conclusively show them. When error is predicated upon the evidence, it must be sufficiently set out in the abstract. *Holwig v. Rowler et al.*, 96.
3. REPEAL OF STATUTE: TRIAL DE NOVO. The repeal of section 2742 of the Code, respecting trials *de novo*, pending the appeal of a case, does not entitle the appellant to a trial *de novo* if the case were tried below upon oral testimony. *Trebon v. Zuraff et al.*, 180.
4. PRESUMPTION. Every presumption will be indulged in favor of the correctness of the rulings upon the trial, and a judgment will not be reversed for error in such rulings, if for any reason they can be sustained. *Id.*
5. PARTIES. Any objection based upon a failure to include a necessary party, first made on appeal, does not constitute good ground for a reversal of the judgment. *Id.*
6. EQUITABLE ISSUES. Under the Code a case involving equitable issues only, upon the trial of which no motion or order was made for a trial upon written evidence, cannot be determined upon its merits on appeal. *Fletcher v. Terrell et al.*, 267.
7. AMENDMENT. It is the general rule of practice in the Supreme Court that an amendment to an abstract filed after the case has been submitted will not be considered. *Id.*
8. TRIAL DE NOVO. A case will not be tried *de novo* in the Supreme Court unless all the evidence in the case is presented on appeal and so certified by the trial judge. *Walker et al. v. Beaver et al.*, 504.
9. ———: STARE DECISIS. Prior decisions of the Court will not be reconsidered upon objections of counsel without argument. *Id.*

See PRACTICE, 15.

PRINCIPAL AND AGENT.

1. WHO IS NOT AN AGENT. If a debtor employs an agent to carry money to his creditor, the creditor, by accepting the money, does not make the messenger his agent so that, if at another time the messenger should appropriate the money, the loss would be that of the creditor and not of the debtor. *Fisher v. The Schiller Lodge*, 459.

See CONTRACT, 9.

CORPORATIONS, 5, 12.

EVIDENCE, 11.

INSURANCE, 6.

PROMISSORY NOTE.

1. GUARANTOR: JURISDICTION. In an action before a justice of the peace a notice that the plaintiff claimed of the defendant on a promissory note, although the latter was merely guarantor of the note, was *held* to be sufficient. *Francis v. Bentley*, 59.
2. SIGNATURE: EVIDENCE. The denial of the genuineness of a signature to a promissory note may be overcome by its similarity to an admitted signature and other circumstances. *McDonald & Co. v. Noonan*, 83.

3. **EVIDENCE.** Evidence was competent to show that judgment had been rendered upon other notes, like the one in controversy, with the knowledge of defendant. *Id.*
4. **BONA FIDE HOLDER: CORPORATION.** Where a note executed by a corporation was subsequently indorsed by the payee without recourse, the consideration therefor never having been paid, and it then came into the possession of the secretary of the company, who in turn negotiated it for value before maturity, it was *held* that the party taking it from the secretary was entitled to protection as a *bona fide* holder. *Wormer & Sons v. The Waterloo Agricultural Works et al.*, 262.
5. **EXTENSION OF TIME.** The granting of an extension of time is a sufficient consideration to uphold a note which has been obtained and negotiated in fraud of the maker. *Id.*
6. **CONSIDERATION: ORAL AGREEMENT.** A contemporaneous oral agreement may be the consideration for a promissory note, and a failure to perform the agreement will constitute a failure of the consideration of the note. Per BECK, J., ROTHROCK, Ch., J., concurring. *Simpson Centenary College v. Bryan*, 293.
7. ———. A note executed to an educational institution as a gift, upon the strength of which it has assumed responsibilities and incurred liabilities, is not without consideration. Per ADAMS, J., SEEVERS and DAY, JJ., concurring. *Id.*
8. ———. An agreement, made at the time of the execution of the note, that the fund in favor of which it was executed should not be diminished, cannot be regarded as constituting the consideration for the note. Per ADAMS J., SEEVERS and DAY, JJ., concurring. *Id.*
9. **ACTION UPON: INSTRUCTION.** In an action upon a promissory note, commenced before maturity, it is competent for the court to instruct the jury to find for defendant. *Seaton & Spaan v. Hinneman*, 395.
10. **ASSIGNMENT OF: BANKRUPTCY.** The assignee of a note before maturity, with notice of bankruptcy proceedings commenced against the maker, cannot maintain an action thereon. *Id.*
11. ———: **PARTY.** The holder of a negotiable promissory note may maintain an action thereon, though it has not been indorsed to him, by showing that he is the owner otherwise than by indorsement. *Warnock v. Richardson et al.*, 450.
12. **CORPORATIONS: FRAUD OF OFFICER.** The board of directors of defendant authorized its president and secretary to negotiate a loan. The treasurer subsequently informed the president that he had negotiated a loan of M. in accordance with the vote of the board of directors. The president thereupon signed certain notes and gave them to the treasurer, with instructions to the latter to get the money before he surrendered the notes. As a matter of fact the treasurer had not negotiated a loan with M., but left the notes in his possession for a time, when they were returned indorsed without recourse. He then took one of them to plaintiff, who was a stockholder of defendant, a director and member of its executive committee, and the plaintiff took the note, giving therefor a certain amount in cash, his own notes for a specified amount, and receipting an account against defendant: *Held*, that notwithstanding the *mala fides* of the treasurer the plaintiff was holder of the note in good faith, and entitled to recover. *Pond v. The Waterloo Agricultural Works et al.*, 596.

13. **USURY.** The plaintiff having paid less than the face of the note the transaction was usurious, and he was entitled to recover only the actual amount of his advances, without interest or costs. *Id.*

See PRACTICE, 3.

RAILROADS, 3, 4, 5, 6.

STATUTE OF FRAUDS, 1.

USURY, 1.

PUBLIC LANDS.

1. **RAILROAD GRANT: TAXATION.** Chapter 34, Laws of 1874, authorizing the certification to the Sioux City & St. Paul Railroad Company of the lands held by the State in trust for that company, did not have the effect to pass the title until after the lands had been certified by the Governor, and they were not, therefore, taxable to the company until after such action by the executive. *The S. C. & St. P. R. Co. v. The County of Osceola*, 177.

RAILROADS.

1. **EJECTMENT OF PASSENGER: EXEMPLARY DAMAGES.** Where an employe of a railway company, in enforcing a valid rule of the company, in a case to which he in good faith believes it to apply, without wantonness, indignity or insult, ejects a passenger from a train, exemplary damages are not recoverable therefor. *Fitzgerald v. The C., R. I. & P. R. Co.*, 79.

2. **LIABILITY FOR FIRES: NEGLIGENCE.** Section 1289 of the Code, providing that railway companies "shall be liable for all damages by fire that is set out or caused by the operation" of their roads, does not create an absolute liability, but makes the fact of an injury so occurring only *prima facie* evidence of negligence, which may be rebutted by proof of freedom from negligence.

Argument 1. The statute provides that the manner of recovery shall be the same as for injury to stock, but in the latter case the company can escape liability by showing freedom from negligence.

Argument 2. Exposure to fire is a part of the injury for which right-of-way damages are allowed, and it is presumed to be paid for when such damages are paid.

Argument 3. Where a statute is of doubtful construction the public interest should be considered, and public interest would forbid the making of railway companies absolute insurers for all the property which may happen to be destroyed by fire set by the operation of their roads.

Argument 4. At common law the doctrine prevailed in this State that contributory negligence would defeat a recovery for property destroyed by fire set by a railway company. BECK, Ch. J., and DAY, J., *dissenting*. *Small v. The C., R. I. & P. R. Co.*, 338.

3. **SUBSIDY NOTES.** A note given to aid in the construction of the Albia, Knoxville & Des Moines Railroad provided that it should become due if the road were constructed and the cars running from Albia to Knoxville within two years: *Held*, that it was not a condition precedent to liability on the note that the road should be constructed to Des Moines. *Merrill v. Reaver*, 404.

4. ———: CORPORATIONS. Contracts made by corporations do not embrace as parts and conditions thereof the articles of the corporation. *Id.*
5. ———: ———. A part of the consideration of the note being stock of the company to be issued, an illegal increase thereof would constitute a defence to the note only upon proof that the stock illegally issued could not be distinguished from the legal stock. *Id.*
6. ———: ———. The fact that the affairs of a corporation are unwisely managed, or its contracts not authorized by the articles of incorporation, will not relieve a stockholder from liability to pay his subscription for stock. *Id.*
7. EVIDENCE: CONSTRUCTION OF CARS. In an action against a railroad company for damages alleged to have been received through the use of cars with double dead-woods, it was competent to introduce evidence tending to show the advantages or disadvantages of the use of cars constructed in this manner. *Baldwin v. The U., R. I. & P. R. Co.*, 680.
8. CARS OF OTHER ROADS: NEGLIGENCE. It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employe assumes in undertaking the employment. *Id.*

See CONTRACT, 12.

EVIDENCE, 17, 18.

NEGLECT, 2.

TAXATION, 1, 2, 3, 4, 5, 6.

RECEIPT.

1. ALTERATION IN. Evidence considered which was held to establish an alteration in a receipt. *Wilson v. Fulliam et ux.*, 123.

REFEREE.

1. PRACTICE. In the absence of the evidence, the finding of a referee upon a question of fact will be presumed to be correct. *Peck v. Schick & Co.*, 281.
2. FINDING OF FACT. The finding of fact of a referee in a law action stands as the verdict of a jury. *Cooley v. Osborne et al.*, 526.

REPLEVIN.

1. INSTRUCTION. In an action to recover possession of personal property, where the defendant alleged that he retained it under a contract giving him a special property therein, it was error to refuse an instruction that if the contract was established as alleged the plaintiff could not recover. *Lytle v. Crum*, 37.
2. OFFICER CANNOT RECOVER FOR DEFENDING. An officer cannot recover for his time and expenses in successfully defending in an action for replevin for personal property which he had levied upon; and with respect to which the plaintiff in the replevin suit had served no notice of claim of ownership. *Rickabaugh v. Bada*, 56.

3. **PRACTICE.** In a replevin suit, where the plaintiff has obtained possession of the property, the court is justified in exacting prompt obedience to its orders made for the purpose of obtaining a speedy trial. *Becker v. Becker et al.*, 139.
4. **PLEADING: PRACTICE.** Where, in an action of replevin, the plaintiff dismisses his petition before an answer is filed, the defendant is nevertheless to have a judgment for his interest in the property replevied. But if he files an answer, notwithstanding the dismissal, claiming other and further relief, the plaintiff should be allowed to plead thereto, and introduce evidence upon the issues thus raised. *ADAMS, J., dissenting. Crist et al. v. Francis et al.*, 257.

See JURISDICTION, 2.

RES ADJUDICATA.

1. **DOWER: ESTOPPEL.** A proceeding by a widow for dower in lands, to which her husband held the legal title, is not an adjudication of her rights in other lands in which her husband had an equitable interest, nor is she estopped thereby from claiming an interest in such lands. *Donaho et al. v. Smith*, 218.

RESIDENCE.

See SETTLEMENT.

SALE.

See CONTRACT, 3.

SCHOOLS.

1. **PUNISHMENT OF PUPILS.** In the absence of proof to the contrary the law will presume that a teacher punishes a pupil for a reasonable cause, and in a moderate and reasonable manner; but this presumption may be rebutted by proof. *The State v. Mizner*, 145.
2. ———. The punishment of the pupil must be for some specific offense which the pupil has committed, and which he knows he is being punished for. *Id.*
3. ———: **AUTHORITY OF TEACHERS.** The teacher is not authorized to punish a pupil for refusing to do something the parent has requested that the pupil be excused from doing. The teacher may be justified in refusing to permit the attendance of a pupil whose parent will not consent that he shall obey the rules of the school. *Id.*

SCHOOL DISTRICT.

1. **USE OF SCHOOL-HOUSE.** The electors of a district township, when legally assembled, may authorize the use of the school-houses of the district for religious purposes, and under the authority thus conferred a sub-director is empowered to permit the school-house of his sub-district to be so used. *Davis v. Bogel et al.*, 11.

2. ——— : CONSTITUTIONAL LAW. The use of a school-house for such purpose, when so authorized, is not prohibited by section 3, article 1 of the Constitution. *Id.*
3. TAXATION FOR SCHOOL-HOUSE. Where, at a meeting of the electors of a district township, it was voted "that there be an appropriation sufficient to build a house on the line between sub-districts 1 and 8," and it was further voted "that there be eight hundred dollars levied as school-house tax," it was *held* that this amounted to voting a tax for the school-house described in the first motion. *Benjamin v. The District Township of Malaka et al.*, 648.
4. ——— : MANDAMUS. The directors having refused to proceed to the erection of a school-house, *mandamus* was the proper remedy to compel them to do so. *Id.*
5. ——— : VESTED RIGHT. The tax having been voted and collected, the right of the people of the sub-district to the school-house became a vested one, and it was not then competent for the electors to rescind their former action. *Id.*
6. CONDEMNATION OF LAND : NOTICE. The holder of a certificate of tax sale is entitled to notice of proceedings to condemn the land embraced in his certificate for a school-house site, and he cannot be deprived of his interest without compensation therefor. *Cochran v. The Ind. School District of Council Bluffs*, 663.
7. ——— : ———. A notice by publication, to the holder of the legal title, and "all other persons interested," was *held* not sufficient to charge the holder of the tax-sale certificate with notice. *Id.*

See SURETY, 3.

SERVICES.

1. PHYSICIAN : PAUPER. Where a physician rendered services to a pauper at the request of the township trustees, it was *held* to be competent for the board of supervisors to waive a certificate from the trustees that the services had been rendered, and that the physician was entitled to recover against the county. *Collins v. Lucas County*, 448.

SETTLEMENT.

1. RESIDENCE. The residence in a county necessary to establish a settlement therein must be personal presence in a fixed and permanent abode, or of a character indicating permanency of occupation, as distinct from lodging, boarding, or temporary occupation. *The County of Cerro Gordo v. The County of Wright*, 439.
2. ——— : BOARD OF SUPERVISORS. Before an action can be maintained against a county upon an unliquidated claim, the same must have been presented to the board of supervisors, and payment refused by them. *Id.*
3. NOTICE. Where a person having a legal settlement in one county becomes sick and disabled in another, a notice by the auditor of the latter to the auditor of the former that relief is being furnished, is sufficient to charge the county in which the pauper has a settlement. *Id.*

STATUTES CITED, CONSTRUED, ETC.

CODE OF 1851.

- Sec. 111. County Judge. *The State v. The C., R. I. & P. R. Co.*, 693.
 " 506. Tax Sale. *Atkins v. Paige*, 667.

REVISION OF 1860.

- Sec. 312. Board of Supervisors. *Wilhelm v. Cedar County*, 255.
 " 739. Taxation. *Royce v. Jenney et al.*, 679.
 " 2281. Homestead. *Rutt v. Howell et ux.*, 698.
 " 2437. Descent. *Will of Gustav L. F. Overdieck*, 246.
 " 2479. Descent. *Wilson v. Breeding*, 633.
 " 3090. Equitable Jurisdiction. *The Blair Town Lot & Land Co. v. Walker*, 380.

CODE OF 1873.

- Sec. 34, 45. Statute. *Simondson v. Simondson*, 111.
 " 183. Practice. *Carmichael v. Vandebur and Hopkins*, 453.
 " 303. Board of Supervisors. *Wilhelm v. Cedar County*, 255.
 " 305, 306. Attachment. *The State v. Morris*, 295.
 " 392. Township Trustees. *Merrill v. Welscher et al.*, 70.
 " 455. Tax Sale. *Lathrop v. Howley*, 42.
 " 561. Streets. *Davis et al. v. The City of Clinton*, 586.
 " 627. Election. *Rankin v. Pitkin et al.*, 314.
 " 829, 830, 831, 832, 833. *Royce v. Jenney et al.*, 677.
 " 845. Taxation. *Beecher v. The Board of Supervisors of Webster County et al.*, 338.
 " 1064. Corporations. *Elsfeld v. Kenworth et al.*, 391.
 " 1068. Corporations. *Elsfeld v. Kenworth et al.*, 330.
 " 1078. Corporations. *Pond v. The Waterloo Agricultural Works et al.*, 606.
 " 1289. Railroads. *Small v. The C., R. I. & P. R. Co.*, 334, et seq.
 " 1292. Railroads. *Baldwin v. The C., R. I. & P. R. Co.*, 686.
 " 1352. Settlement. *The County of Cerro Gordo v. The County of Wright*, 442.
 " 1357. County. *The County of Cerro Gordo v. The County of Wright*, 443.
 " 1366. Services. *Collins v. Lucas County*, 419.
 " 1490, 1491, 1492, 1506. Fences. *Peschong v. Mueller*, 239.
 " 1550. Intoxicating Liquors. *Smith, Cleary & Enright v. Leddy et al.*, 114.
 " 1717. School Districts. *Davis v. Boget et al.*, 15; *Benjamin v. The District Township of Malaka et al.*, 649.
 " 1723. School Districts. *Benjamin v. The District Township of Malaka et al.*, 649.
 " 1753. School Districts. *Davis v. Boget et al.*, 15.
 " 1855-1828. School District. *Cochran v. The Independent School District of Council Bluffs*, 665.
 " 1923. Sale. *Smith v. Champney*, 175.
 " 1988, 1993. Homestead. *Rutt v. Howell et ux.*, 537.

- Sec. 2077. Interest. *Humphrey v. The Patrons' Mercantile Association*, 615.
 " 2084, 2088. Contract. *Salas v. Kier et al.*, 699.
 " 2092. Promissory Note. *Seaton & Spaan v. Hinneman*, 397.
 " 2137. Mechanic's Lien. *Weston & Co. v. Dunlap et al.*, 184.
 " 2139-2141. Mechanic's Lien. *Conrad & Ewinger et al. v. Starr et al.*, 430.
 " 2141, 2141, 2142. Mechanic's Lien. *Loring & Co. v. Small et al.*, 273.
 " 2308, 2310. Adoption. *Wagner v. Varner*, 533.
 " 2337. Descent. *Will of Gustav L. F. Overdieck*, 246.
 " 2367. Administration. *Bridgman & Co. v. Miller et al.*, 394.
 " 2371. Descent. *Wilson v. Breeding*, 632.
 " 2440. Descent. *Wilson v. Breeding*, 633; *Conrad & Ewinger et al. v. Starr et al.*, 476.
 " 2453, 2454. Descent. *Wagner v. Varner*, 533.
 " 2454. Descent. *Will of Gustav L. F. Overdieck*, 246.
 " 2525. Cause of Action. *Gray v. McCallister*, 502.
 " 2529, 2531, 2531. Statute of Limitations. *Evans v. Montgomery et al.*, 382.
 " 2532. Practice. *Parkyn v. Travis et ux.*, 438.
 " 2543, 2544. Party. *Toney v. Snuder*, 74.
 " 2578. Venue. *Lomax et al. v. Smyth & Co. et al.*, 232.
 " 2585. Corporations. *The Centennial Mutual Life Ass'n v. Walker*, 77.
 " 2589. Venue. *The First National Bank of Muscatine v. Krance et al.*, 236.
 " 2590, 2591. Change of Venue. *Gibson v. Abbott et al.*, 155.
 " 2599. Commencement of Action. *Parkyn v. Travis et ux.*, 438.
 " 2600. Practice. *Webster v. Hunter*, 216.
 " 2610. County. *The County of Cerro Gordo v. The County of Wright*, 442.
 " 2612, 2613. Service. *The Centennial Mutual Life Ass'n v. Walker et al.*, 78.
 " 2636. Pleading. *Williams v. The Niagara Fire Ins. Co.*, 563.
 " 2650. Pleading. *Seaton & Spaan v. Hinneman*, 397.
 " 2659, 2660. Pleading. *Pond v. The Waterloo Agricultural Works et al.*, 605.
 " 2663. Pleading. *Rose v. Schaffner et al.*, 187.
 " 2664. Pleading. *Clapp v. Cunningham*, 308.
 " 2689. Pleading. *Peck v. Schlick & Co.*, 285.
 " 2712. Pleading. *Williams v. The Niagara Fire Ins. Co.*, 563.
 " 2720. Pleading. *Simpson Centenary College v. Bryan*, 297.
 " 2742. Practice in the Supreme Court. *The Howe Machine Co. v. Woolly et ux.*, 552; *Simondson v. Simondson*, 111; *Trebon v. Zuraff et al.*, 181; *Fletcher v. Terrell et al.*, 269; *Harlan v. Porter et al.*, 448; *The Joliet Iron & Steel Co. v. The C. C. & W. R. Co. et al.*, 458; *Walker et al. v. Beaver et al.*, 506; *Hunt v. Downs et al.*, 697; *Lewis v. Pearson et al.*, 702.
 " 2749. Practice. *Williams v. The Niagara Fire Ins. Co.*, 563.
 " 2787. Practice. *Lytle v. Crum*, 39.

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 " 2815, 2816. Equitable Jurisdiction. *The Blair Town Lot & Land Co. v. Walker*, 380, 385.
 " 2837-2843. New Trial. *Carpenter v. Brown*, 454.
 " 2870. Service. *Hale v. The First National Bank et al.*, 645.
 " 2871. Practice. *Walker v. Hutchinson et ux.*, 366.
 " 2951, 3021. Attachment. *The State v. Morris*, 206.
 " 3048, 3049. Public Buildings. *Loring & Co. v. Small et al.*, 273.
 " 3055. Levy of Execution. *Rickabaugh v. Bada*, 57.
 " 3103, 3106, 3121. Judicial Sale. *Clayton et al. v. Ellis et al.*, 591, et seq.
 " 3154, 3155, 3159, 3160. New Trial. *Carpenter v. Brown*, 453.
 " 3164. Appeal. *The First National Bank of Leon v. Gill & Co. et al.*, 428.
 " 3239. Replevin. *Crist et al. v. Francis et al.*, 259.
 " 3373. Mandamus. *Davis v. Boget et al.*, 14.
 " 3518. Practice. *Francis v. Bentley*, 60.
 " 3641. Criminal Law. *The State v. Houston*, 513.
 " 3743. Deposition. *Cook v. Blair*, 129.
 " 3804, 3837. Justice of the Peace. *Pennington v. Beedy*, 36.
 " 3863. Criminal Law. *The State v. Atherton*, 191.
 " 3895. Criminal Law. *The State v. Gustafson*, 195.
 " 4174. Extra-dition. *Jones and Atkinson v. Leonard*, 107.
 " 4276. Criminal Law. *The State v. Houston*, 513.
 " 4294. Indictment. *The State v. Smouse et al.*, 44.
 " 4300. Indictment. *The State v. Brannon*, 375.
 " 4535, 4538. Appeal. *The State v. Barlow*, 701.
 " 4593, 4594. Bail. *The State v. Kraner*, 583.
 " 4600. Bail. *The State v. Hirronemus*, 548; *The State v. Kraner*, 577; *The State v. Kraner*, 584.

LAWS OF 1854.

Chap. 91. Taxes. *Lathrop v. Howley*, 42.

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Chap. 105. Tax Sale. *Atkins v. Paige*, 667.

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Chap. 151. Descent. *Wilson v. Breeding*, 633.
 " 172. School Districts. *Davis v. Boget et al.*, 15.

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Chap. 138. Insurance Companies. *The Davenport Fire Ins. Co. v. Moore*, 621.

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Chap. 2. Taxation in aid of Railroads. *Merrill v. Welsher et al.*, 68.

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Chap. 8. Division Lines. *Peschongs v. Mueller*, 239.
 " 29. Taxation. *Beecher v. The Board of Supervisors of Webster County et al.*, 518.
 " 34. Private and Local Laws. Land Grant. *The S. C. & St. P. R. Co. v. The County of Oscola*, 178.
 " 48. Private and Local Laws. Railroad Tax. *Merrill v. Welsher et al.*, 68.

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Chap. 118. Change of Venue. *Gibson v. Abbott et al.*, 156.
 " 145. Practice. *Simondson v. Simondson*, 111; *Trebon v. Zuraff et al.*, 181; *The Joliet Iron & Steel Co. v. The C. C. & W. R. Co.*, 458; *Hunt v. Downs et al.*, 697.

STATUTE OF FRAUDS.

1. PROMISSORY NOTE: DEBT OF ANOTHER. The statute of frauds will not exempt from liability one who has received a part of the consideration of a note, notwithstanding he was not a signer thereof. *Dee v. Downs et al.*, 310.
2. AGREEMENT TO CONVEY. An agreement to foreclose a mortgage and convey the land acquired thereunder to another is not within the statute of frauds and may be proved by parol. *Cooley v. Osborne et al.*, 526.

STATUTE OF LIMITATIONS.

1. RECOVERY OF TAXES: MUNICIPAL CORPORATIONS. An action against a city for the recovery of taxes wrongfully collected is barred in five years from the time of payment. *Hamilton v. The City of Dubuque*, 213.

See MORTGAGE, 1.

TAX SALE, 3.

SURETY.

1. **CHANGE OF CONTRACT: RELEASE.** The surety has the right to stand upon the terms of the original contract, and any material change therein without his consent, affecting the subject-matter of the contract, even to a slight degree, will exonerate him. *The Ind. Dist. of Mason City v. Reichard et al.*, 98.
2. **CONTRACT: SIGNATURE IN OFFICIAL CAPACITY.** Where a party signs a contract in his official capacity he is not liable individually, and an action may be maintained thereon against a surety in the name of the party or corporation he represented. *Id.*
3. **SCHOOL DISTRICT.** While a school district, in whose favor a bond to secure a contract had been executed, might not have power directly to release the sureties, it had authority to change the contract, and the effect of the change would be the release of the sureties. *Id.*
4. **DEPARTURE FROM CONTRACT.** The fact that an agent, under a contract to sell machines, was paid some of his commissions before they were due, was not such a departure from the contract as would release a surety upon his bond for the faithful performance of his obligation under the contract. *The Howe Machine Co. v. Woolly et ux.*, 549.

TAXATION.

1. **IN AID OF RAILROAD.** A tax to aid in the construction of a railroad was voted in the township of K., to be expended in that and two other townships specified. Double the amount of the tax was expended by the company in constructing the road through K., but nothing was expended in either of the other townships: *Held*, that the three townships should be regarded as a unit, and that the tax was not forfeited by the failure to expend any part of it in either of the other townships specified. *Merrill v. Welsher et al.*, 61.
2. ———: **SURVEY.** The survey of the line of a road previous to the voting of a tax does not constitute a representation respecting the line of the road which is binding upon the company, or upon which the tax payer is authorized to rely. *Id.*
3. ———: **SUSPENSION OF WORK.** A suspension of work upon the road for three years and ten months was *held* not to work a forfeiture of the tax. *Id.*
4. ———: **ESTOPPEL.** Nor would the company be estopped to collect the tax because it had advised, when the work temporarily ceased, that the collection of the tax should be suspended. *Id.*
5. ———: **CERTIFICATE.** That the certificate of compliance by the company with the conditions of the tax was not executed in accordance with any order of the trustees, made at a meeting thereof, was *held* not to invalidate the tax, the certificate having been duly signed. *Id.*
6. ———: **ASSIGNMENT.** A tax voted to aid in the construction of a railroad is assignable. *Id.*
7. **ACTION TO RESTRAIN COLLECTION: PARTIES.** Where an alleged illegality in taxation extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented by one bill filed by all or any number thus interested, such joint bill may properly be filed. *Brandirff et al. v. Harrison County et al.*, 164.

8. **ILLEGAL TAX: INJUNCTION.** Where a tax is illegal because there has been in no proper sense an assessment and levy, injunction is the proper remedy for the parties from whom it is sought to collect the tax.
9. ——— : **ESTOPPEL.** A county, having sought to levy the tax upon the land as plaintiffs, is estopped to afterward deny plaintiffs' title to the land in an action by the latter to restrain the collection of the tax. *Id.*
10. **EQUALIZATION: POWER OF SUPERVISORS.** The board of supervisors, as a board of equalization, has no authority to add property not assessed to the assessment roll or tax list, or to strike property therefrom duly assessed, its duties being limited to equalizing the value of property assessed by the proper officer. *Royce v. Jenney et al.*, 676.
11. ——— : **CERTIORARI.** Where the board has exercised powers not within its jurisdiction *certiorari* is the proper remedy for the tax payer aggrieved thereby. *Id.*

See BOARD OF SUPERVISORS, 1.

CONSTITUTIONAL LAW, 1, 2, 3.

PUBLIC LANDS, 1.

SCHOOL DISTRICT, 3, 4, 5.

TAX SALE.

1. **MUNICIPAL CHARTER: DEMAND.** Where the charter of a city provided that demand of the city tax must be made a reasonable time before sale, if the supposed owner could be found in the city, *held*, that it was competent, notwithstanding a tax deed had been executed and was introduced in evidence, to show that no demand had in fact been made, and that, upon proof thereof, the deed should not be sustained. *Lathrop v. Howley*, 39.
2. **TENANT IN COMMON.** If a tenant in common is not in possession, and his title, therefore, does not of itself amount to an ouster and eviction, his co-tenant may strengthen his title by the purchase of a title acquired under a tax sale, and such purchase will not enure to the benefit of the tenant claiming exclusively under the patent title. *Alexander v. Sully*, 192.
3. **REDEMPTION FROM: STATUTE OF LIMITATIONS.** An action to foreclose a right of redemption from tax sale was not barred, under the Code of 1851, until after ten years and six months from the time the purchaser became entitled to his deed, the statute not commencing to run until after six months from the time of completed sale. *Atkins v. Paige*, 666.

See SCHOOL DISTRICT, 6, 7.

TORT.

1. **ASSIGNMENT OF CLAIM.** A claim based upon a personal tort, which dies with the party, may be assigned or transferred like any other cause of action. *Gray v. McCallister et al.*, 497.
2. ——— : **EQUITIES.** The assignee of such claim, who is a creditor of the assignor, is not postponed to the holder of a judgment against the assignor; nor are his equities inferior to those of the judgment creditor. *Id.*

TRUST.

1. ACTION TO FORECLOSE. Where a deed of trust was executed to secure advances to be made, and plaintiffs, among others, made such advances, *held*, that although parol evidence was necessary to show that plaintiffs had made the advances, yet it was competent for them to maintain an action to foreclose the deed of trust, the refusal of the trustees to do so being averred. *White & Smith v. Savery et al.*, 515.

See CONVEYANCE, 3.

CORPORATION, 1.

HUSBAND AND WIFE, 1.

USURY.

1. CONFESSION OF JUDGMENT. A confession of judgment, in consideration of the extension of a note, made to evade the law against usury, will be regarded as invalid. *Ohm v. Dickerman*, 672.

See PROMISSORY NOTE, 13.

VENDOR AND VENDEE.

1. FRAUD. The sale of personal property by an insolvent person for its full value, for cash and a pre-existing debt, does not of itself imply fraud in the transaction. *Connolly v. Dillrance*, 92.
2. ——— : LIEN. Fraud will not be imputed to the purchase by the senior lien holder of articles not covered by a junior lien, notwithstanding the senior lien embraced other articles subject to the junior lien. *Id.*
3. ARTICLE WHOSE USE MAY BE UNLAWFUL. Where an article has a lawful use, and has no unlawful use except as a mere incident to the lawful use, the vendor is not bound to presume that it will be used unlawfully, and will not, therefore, be deemed to have knowledge that it will be. *J. M. Brunswick & Balke Co. v. Valteau*, 120.
4. ——— : RULE APPLIED. It constitutes no defense to an action for the purchase price of a billiard table that it may be used for the purpose of gambling, and knowledge that it will be so used cannot be inferred by the fact that the table is accompanied with a pool set and rules for playing the game. *Id.*
5. CHANGE OF POSSESSION. Where a person sells a field of corn standing upon his farm, and the vendee does not commence to harvest it, nor otherwise visibly to take charge of the corn or control of the field in which it stands, the actual possession is not changed, within the meaning of the statute providing that "no sale of personal property, where the vendor retains actual possession, is valid against existing creditors or purchasers without notice," unless the instrument evidencing the sale be recorded. *Smith v. Champney*, 174.
6. EVIDENCE. Evidence considered which was *held* insufficient to sustain a defense, on the ground of payment, to an action to recover possession of real estate which the defendant occupied under a bond for a deed. *Austin v. Wilson et al.*, 207.
7. REPRESENTATIONS. A statement by the vendor, in the sale of a mill and water-power, that "the stream would furnish sufficient water to run the mill day and night eight months of the year," was *held* not to constitute a representation entitling the vendee to damages, if the statement proved not to be true. *Clark v. Ralls et al.*, 275.

8. **WARRANTY.** Nor did such a statement constitute a warranty, it being at most but an expression of opinion, upon which the vendee was not authorized to rely. *Id.*
9. ———. If the vendor had made false and fraudulent statements as to existing facts, as distinguished from opinions, upon which the vendee was justified in relying, he would be entitled to recover for the injury. *Id.*
10. **FRAUDULENT REPRESENTATIONS.** Where an agent of the vendor, whose title was that of holder of a certificate of purchase at sheriff's sale, took the vendee upon the land proposed to be sold, and as an inducement to the sale pointed out certain improvements which were known by the vendor not to be covered by the certificate, and with such knowledge assigned the certificate, he cannot urge that the vendee should have made inquiry with respect to such improvements. *Carmichael v. Vandebur and Hopkins*, 651.

See CONTRACT, 1.

VENUE.

1. **CHANGE OF: APPLICATION FOR.** An application for change of venue, grounded upon the prejudice of the people of the county, cannot be made in vacation before the issues are made up. *Gibson v. Abbott et al.*, 155.
2. **JURISDICTION: PRACTICE.** Where, upon a default being set aside, the defendants were required to answer in twenty days, and after that time had elapsed moved for an order for change of place of trial on the ground that they were residents of another county, *held*, that upon default being a second time obtained they were not entitled to relief. *The First National Bank of Muscatine v. Krance et al.*, 235.
3. **CHANGE OF.** An abuse of discretion must be shown, in a refusal to grant a change of venue on account of prejudice of the judge, to constitute error. *The State v. Ray*, 520.

WAGER.

See PARTIES, 1.

WARRANTY.

See CONTRACT, 10

CONVEYANCE, 3, 4, 8

VENDOR AND VENDEE, 8, 9.

WILL.

1. **DEVISE OF LIFE ESTATE.** A will devising the use and enjoyment of certain real estate to A. "to be enjoyed by her during her natural life only," and after her death to her heirs, "free and clear of all liens and incumbrances thereon," was *held* to give her only a life estate, the intent of the testator being to create a new stock of descent at her death. *Slammer v. Orampton et al.*, 302.



